91-601

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October 1991 Term

EDWARD J. ROMERO,

Petitioner,

v.

ALBERT AGUAYO, DONALD MOSER, JAMES SCAMMAN, and SCHOOL DISTRICT NO. 1, CITY AND COUNTY OF DENVER,

Respondents.

Petition for Writ of Certiorari To The United States Court of Appeals For The Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the teacher presented evidence indicating his exercise of protected rights played a substantial or motivating part in the decision of the board of education to discharge him where the teacher showed that

(a) the administrator who instigated the proceedings against him was retaliating for constitutionally protected conduct, and

(b) the board of education routinely discharged teachers whose discharge was sought by the administration.

2. Whether the findings of an impartial administrative hearing officer, whose recommendation of discharge was advisory only, broke the chain of

causation between the retaliatory motives of the individual school administrator who instigated the discharge proceedings and the board's discharge decision as a matter of law.

PARTIES TO THE PROCEEDING

The parties to this proceeding consist solely of the parties listed in the caption.

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Neither the decision of the United States Court of Appeals for the Tenth Circuit (App., *infra*, A1- A12) nor the opinion and order of the United States District Court for the District of Colorado (App., *infra*, A13-A36) were published.

JURISDICTION

The judgment of the Court of Appeals was entered on May 31, 1991. The Court of Appeals denied petitioner's timely petition for rehearing and suggestion for rehearing *en banc* on July 10, 1991. The jurisdiction of this court to review the judgment of the Court of Appeals is invoked under 29 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The 1st and 14th Amendments to the United States Constitution, 42 U.S.C.

§§ 1983 and 1985, and relevant provisions of the Colorado Teacher Employment Dismissal and Tenure Act, C.R.S. §§ 22-63-101, *et seq.*, are set forth at App., *infra*, A128-A133.

STATEMENT OF THE CASE

From 1971 through June, 19, 1986, petitioner Edward J. Romero ("Romero") was a Colorado state certified industrial arts teacher and an interscholastic wrestling coach employed by respondent School District No. 1, City and County of Denver ("the district"). Throughout his tenure with the district, Romero was a vocal advocate of the rights and interests of minority students. Romero alleged this advocacy inspired a campaign by the respondents in concert to discharge Romero, thus violating Romero's constitutionally protected right to

freely speak out on issues of great public concern.

During the 1978-79 school year, the junior high school where Romero was assigned experienced racial difficulties, including a walkout by hispanic students. Romero was accused of leading the walk out and was transferred twice to other junior high schools. Romero challenged the transfer through grievance arbitration and in state court as a disciplinary action in retaliation for his advocacy of the interests of hispanic students.

During the 1982-83 school year, Romero was removed as head wrestling coach by his principal prior to the trial of his action in state court over his transfer. Romero challenged his removal as wrestling coach in the pending state

court proceeding and demonstrated that a substantial and motivating factor in his removal was his participation in the peaceful, non-disruptive protest of his wrestling team over racial indignities they had experienced at another school.

A fellow wrestling coach from another high school within the district, Glen Scheele, testified on Romero's behalf. Forty-one days later, Scheele was asked to resign by respondent Albert Aguayo ("Aguayo"), then Scheele's principal. When Scheele refused, Aguayo removed him as coach, telling him that his superiors did not like what he had done in testifying for his buddy, Romero. Scheele successfully sued Aguayo, the district and other administrators in federal district court for deprivation of his civil rights, receiving a judgment

entered upon a verdict for $100,000.00 which was satisfied without appeal. [1] Romero attended Scheele's trial. He was subpoenaed as a witness, though he did not testify. Aguayo, then assistant superintendent in charge of secondary education, challenged Romero's presence, questioning why he was there.

A parent contacted Aguayo in the first week of January, 1986 concerning complaints about Romero. Customarily, such complaints would have been referred to Romero's principal, respondent Donald Moser ("Moser"), on investigation. Aguayo, however, immediately initiated an investigation of his own. Aguayo took the unprecedented step of arranging a secret meeting at the home of the

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[1] *Scheele v. Aguayo, et al.*, United States District Court for the District of Colorado, Civil Action No. 83-K-321.

complaining parent on January 23, 1986 to which a co-defendant in the *Scheele* case was invited, but not Moser.

On January 27, 1986, before ever meeting with Moser regarding Romero, Aguayo assigned a school security officer, a retired Denver police officer, to investigate Romero, advising the officer that authority for the investigation came directly from respondent James Scamman ("Scamman"), the district superintendent.

Aguayo next prepared a memo for Moser's signature recommending Romero's discharge, which Moser signed on January 30, 1986.

In deposition testimony, Moser first said he prepared the memo, but later admitted he did not prepare it. The memo recommended Romero's discharge for, among

other things, corporal punishment of students and child abuse. However, Moser was unable to recall the particulars of any incident involving Romero except one: a verbal rebuke of a student janitor in 1985 which had been resolved when it first came to Moser's attention and which he did not feel was cause for dismissing Romero.

On January 31, 1986, Romero, accompanied by counsel, met with Aguayo at Aguayo's request. Aguayo's handwritten agenda for the meeting called for giving Romero until 2:00 p.m. that day to refute allegations against him and in any event for Romero's immediate suspension with pay. When Romero and his counsel appeared with a shorthand reporter and asked to make a record of the meeting, Aguayo immediately suspended

Romero and terminated the meeting. On the very same day, Aguayo recommended Romero's discharge to Scamman.

Scamman referred charges for dismissal to the district's board of education under the Colorado Teacher Employment Dismissal and Tenure Act, C.R.S. §§ 22-63-101, *et seq*. The board of education accepted the charges for review. Romero had a lengthy tenure dismissal hearing before the Department of Administration of the State of Colorado in April, 1986. Hearing Officer Marshall A. Snider ("Snider") issued findings of fact and a recommendation to the school board on May 21, 1986. Snider noted that while the district's board of education could dismiss or retain a teacher or place him on probation, he was limited to recommending either dismissal

or retention. C.R.S. § 22-63-117(8) and (10), App., *infra*, A132-A133. Snider stated that:

> . . . as of January 28, 1986, Manuel's administrators were cognizant of some fairly serious misconduct . . . which they did not consider grounds for discipline . . . The hearing officer has also considered Romero's assertion that he is the subject of a vendetta by Dr. Aguayo. The district's treatment of this case in January, 1986 does not reflect an attempt to conduct a thorough, fair investigation. The process was, in reality, spearheaded by Dr. Aguayo, not by the building principal (which would be the normal approach). The investigation took only two days absent any contact with or, input from Romero, and Romero's discharge was almost a foregone conclusion. . . . Romero's conduct known prior to January 28, 1986, warranted no more than a discussion with the teacher in the minds of Manuel's administrators. In January, no consideration was given to warnings or to remediation of Romero's deficiencies. Romero is a competent, dedicated coach who

> was motivated by a desire for excellence, who demands excellence from his charges, and who is concerned with his wrestlers. In most cases, the hearing officer believes Romero's motives regarding his students were proper; unfortunately, his methods tended to be aggressive and heavy-handed. Considering these mitigating factors, the district's board of education may want to consider whether the option of one year's probation is appropriate. The hearing officer, however, has no such option. On balance, considering the nature of his conduct, the hearing officer recommends that Romero be dismissed.

Findings of Fact and Recommendation, App., *infra*, A118-A121.

On June 19, 1986, the district's board of education adopted Snider's recommendation and dismissed Romero after refusing Romero's counsel an opportunity to appear before the board. Subsequently, in the June 14, 1989 edition of the Rocky Mountain News, the

president of the board of education was quoted in a similar case as saying:

> "It is an opinion that is given based on testimony by both sides", Garner said. "We are not bound to follow the law judge's recommendation. I can't recall when a law judge suggested we fire someone and we have kept them on. But there have been recommendations to keep someone on when we have fired them. Those were based on what we were aware of that may not be in the report. Also from information that we get from staff and other things."

Romero filed a 42 U.S.C § 1983 suit in federal district court on January 2, 1987, alleging conspiracy to deprive Romero of his civil rights in violation of 42 U.S.C. § 1985(2) and violation of his civil rights under the 1st and 14th Amendments to the United States Constitution. The trial court granted respondents summary judgment. While noting Romero had produced evidence to

support a finding that Aguayo was motivated by Romero's constitutionally protected conduct in causing the investigation, the district court found the administrative proceedings broke the chain of causation between any retaliatory motivation by the individual respondents in their investigative and persecutive roles and the discharge decision. Memorandum Opinion and Order, App., *infra*, A13-A36.

The Tenth Circuit affirmed. Order and Judgment, App., *infra*, A1-A12.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUIT'S DECISION THAT THE ADMINISTRATIVE FINDINGS BROKE THE CHAIN OF CAUSATION BETWEEN THE RETALIATORY ACTS OF THE INVESTIGATORS AND THE BOARD'S DISCHARGE DECISION AS A MATTER OF LAW IS IN DIRECT CONFLICT WITH THIS COURT'S PRECEDENT AND DECISIONS OF OTHER CIRCUITS.

As we show following, this court's decision in *Malley v. Briggs*, 435 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) and decisions from other circuits are in conflict with the issue of causation and the way in which it was dealt with as a matter of law in this case.

A. Romero presented evidence showing the respondent administrator who instigated the proceedings against him was retaliating for constitutionally protected conduct.

Respondents exhibited a pattern of retaliation against Romero for his free speech and expression on matters of great public concern, namely, the rights and interests of minority students. Romero proved in state court that he was removed as head wrestling coach and transferred twice because of his participation in a

peaceful, non-disruptive protest by his wrestling team over racial indignities suffered the previous school year at another school. Romero's attendance at the *Scheele* trial was noticed and openly challenged by respondent Aguayo. Subsequently, Aguayo initiated an investigation of Romero outside of normal channels.

The historical background of this case exposes the illegitimate motives of the respondents. Two judges have noted the existence of facts showing improper motive and departure from the normal sequence of events.

> The district's treatment of this case in January, 1986 does not reflect an attempt to conduct a thorough, fair investigation. The process was, in reality, spearheaded by Dr. Aguayo, not by the building principal (which would be the normal approach). The investigation took only two

> days absent any contact with or, input from Romero, and Romero's discharge was almost a foregone conclusion.

Findings of Fact and Recommendation (Hearing Officer Snider), App., *infra*, A119.

> After full discovery in this case, the plaintiff has produced enough evidence to support a finding that Albert Aguayo was motivated by the plaintiff's constitutionally protected conduct in causing an investigation of him which did not follow the normal procedural sequence.

Memorandum Opinion and Order (Matsch, J.), App., *infra*, A35.

B. Romero presented evidence that respondent district's board of education routinely discharged teachers whose discharge was sought by the administration.

The district's board of education acted with deliberate indifference by terminating Romero as a matter of custom

and policy, despite the limiting commands of Colorado state law and the recommendations of Hearing Officer Snider.

In the June 14, 1989 edition of the Rocky Mountain News, the president of the district's board of education, speaking on teacher tenure dismissal proceedings in a similar case, was quoted as follows:

> "It is an opinion that is given based on testimony by both sides", Garner said. "We are not bound to follow the law judge's recommendation. I can't recall when a law judge suggested we fire someone and we have kept them on. But there have been recommendations to keep someone on when we have fired them. Those were based on what we were aware of that may not be in the report. Also from information that we get from staff and other things."

The president's statements, which he admitted making in his deposition testimony, constitute a statement of

district policy. The board of education, as a matter of course, considers outside evidence that is not of record and which was not placed before the hearing officer in the formal teacher tenure proceeding. This violates Colorado law and fundamental due process rights. C.R.S. § 22-63-117(10), App., *infra*, A132-A133; *Blaine v. Moffat County School District RE No. 1*, 748 P.2d 1280, 1288 (Colo. S.Ct. 1988) (Under the Teacher Tenure Act, a school board may not look outside the four corners of the hearing officer's findings of evidentiary fact for purposes of discovering some new evidentiary basis for its ultimate decision); *Ricci v. Davis*, 627 P.2d 1111, 1116 and 1118 (Colo. S.Ct. 1981) (A school board in proceedings for dismissal of a tenured teacher may not conduct a full review of

the record to supplement or supersede fact-findings of the teacher tenure hearing panel; evidentiary facts are found by the panel after it has taken and weighed evidence as to both accuracy and credibility at the hearing and are binding on the board of education if supported by substantial and competent evidence in the record); *Cordova v. Lara*, 600 P.2d 105, 107 (Colo. App. 1979) (Where the board of education designates a fact-finding panel to analyze charges against a tenured teacher, it is improper for members of the board to consider recommendations of the school staff).

The individual respondents were well aware of the policy of the district's board of education of routinely dismissing any teacher brought up on teacher tenure dismissal charges. They

knew that once that got the ball rolling, Romero was as good as gone. Indeed, the hearing officer recognized this when he stated:

> The investigation took only two days absent any contact with or, input from Romero, and Romero's discharge was almost a foregone conclusion. (Emphasis supplied).

Findings of Fact and Recommendation, App., *infra*, A119.

Furthermore, the district's board of education was aware of Romero's exercise of protected rights on behalf of minority students and had a history of retaliating against Romero. Romero's suspension as a wrestling coach in the 1982-83 school year was confessed to be substantially motivated by his participation in a peaceful, non-disruptive protest by his wrestling team in response to racial indignities suffered the previous year at

another school. The district, through Aguayo, fired a fellow wrestling coach from another school for having testified on Romero's behalf in a previous lawsuit, telling him that his superiors did not like what he had done in testifying for his buddy, Romero. The district's board of education did not make its final decision to terminate Romero in ignorance of the history of their relationship.

Romero stands in the same position as the plaintiff in *Ware v. Unified School District No. 492, Butler County, State of Kansas*, 902 F.2d 815 (10th Cir. 1990), where a clerk of the board of education and secretary to the superintendent of the school district was terminated in retaliation for exercising her first amendment rights on a matter of

public concern, having spoken out about a bond issue.

Romero was an outspoken and highly visible advocate of the rights of minority students. He supported a colleague in litigation caused by his termination for having supported Romero's challenge of retaliatory transfers.

The court in *Ware* stated:

> School boards are chargeable with the knowledge the employees "may not be dismissed in retaliation for lawful exercise of first amendment freedoms."

Ware, 902 F.2d at 819. The district's board of education is likewise chargeable with such knowledge in this case.

The board of education in *Ware* was aware of the plaintiff's public stand on the bond issue. *Ware*, 902 F.2d at 820,. Likewise, the district's board of education was aware of Romero's advocacy

on behalf of minority students and had a history of taking action against him for his stance. In *Ware*, the court held the evidence was sufficient to create a jury question as to whether the board of education acted with "deliberate indifference" to the plaintiff's first amendment rights. *Ware*, 902 F.2d at 820. Similarly, the district's board of education acted with deliberate indifference by terminating Romero in response for his exercise of first amendment rights by following through on a policy of discharging teachers brought up on teacher tenure dismissal charges as a matter of custom and policy, regardless of the command of Colorado state law and

the recommendations of a hearing officer.[2]

The threat of discharge from public employment is a potent means of inhibiting or chilling speech. *Pickering v. Board of Education Township*, 391 U.S. 563, 574, 88 S.Ct. 1731, 1737, 20 L.Ed.2d 811, 820 (1968). Speech concerning public affairs is more than mere self expression. It constitutes the essence of self government. Accordingly, speech on issues of public concern occupies the "highest rung of the hierarchy of first amendment values" and is entitled to special protection. *Connick v. Meyers*, 461 U.S. 138, 145, 103 S.Ct. 1684, 1689, 75 L.Ed.2d 708, 718 and 719 (1983),

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[2] Hearing Officer Snider urged respondent district's board of education to consider placing Romero on one year's probation. Findings of Fact and Recommendation, App., *infra*, A120.

quoting *NAACP v. Claiborne Hardware Company*, 458 U.S. 886, 913 102 S.Ct. 3409, 3426, 73 L.Ed.2d 1215, 1236 (1982), *rehearing den.*, 459 U.S. 898, 103 S.Ct. 199, 74 L.Ed.2d 160 (1982) and *Carey v. Brown*, 447 U.S. 455, 467, 100 S.Ct. 2286, 2293, 65 L.Ed.2d 263, 273 (1980).

II. THE FINDINGS OF THE IMPARTIAL ADMINISTRATIVE HEARING OFFICER, WHOSE RECOMMENDATION OF DISCHARGE WAS ADVISORY ONLY, DID NOT, AND AS A MATTER OF LAW, COULD NOT BREAK THE CHAIN OF CAUSATION BETWEEN THE RETALIATORY MOTIVES OF THE INDIVIDUAL RESPONDENT WHO INSTIGATED THE DISCHARGE PROCEEDINGS AND RESPONDENT DISTRICT'S DECISION TO DISCHARGE ROMERO.

The Tenth Circuit's decision affirming the district court's finding that the findings of Hearing Officer Snider broke the chain of causation between the motives and actions of the individual respondent and the decision of

the respondent district to terminate Romero is in direct conflict with United States Supreme Court precedent and decisions of other circuits.

Causation is the linch pin of this case and the Tenth Circuit's decision neither acknowledges nor addresses itself to any of the authority relied upon by Romero.

This court has held that 42 U.S.C. § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his action." *Malley v. Briggs*, 435 U.S. 335, 374 n7, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986), citing *Monroe v. Pape*, 365 U.S. 167, 187, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), *overruled in part on other grounds, Monell, et al. v. Department of Social*

Services of the City of New York, et al., 436 U.S. 658, 98 S.Ct. 2108, 56 L.Ed.2d 611 (1978).

In order to establish his § 1983 and § 1985 claims, Romero is obliged to show a causal connection between the acts of the respondents and his discharge. He must show the conduct for which he was discharged was constitutionally protected and that his conduct was a substantial and motivating factor in the decision to discharge him. He has succeeded in making this showing. *Supra*, pp. 14-15. Thus, it is incumbent upon respondents to show by a preponderance of the evidence that the identical decision to discharge him would have been reached even in the absence of the protected conduct. *Mt. Healthy School District Board of Education v. Doyle*, 429 U.S. 274, 287, 97

S.Ct. 568, 576, 50 L.Ed.2d 471, 484 (1987); *Professional Association of College Educators, TSTA/NEA, et al. v. El Paso County Community College District, et al.*, 730 F.2d 258, 265 (5th Cir. 1984), *cert. den.*, 469 U.S. 881, 105 S.Ct. 248, 83 L.Ed.2d 186 (1984). Any inquiry regarding the motivating factor in the Board's decision "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights v. Metro Housing Corporation*, 429 U.S. 252, 266, 97 S.Ct. 55, 50 L.Ed.2d 450 (1977). One factor to be considered is "the historical background of the decision." *Arlington Heights*, 429 U.S. at 267. "The specific sequence of events leading up to the challenged decision may . . . shed some light on the

decisionmaker's purposes." *Ibid.* Additionally, *Arlington Heights* suggests consideration of "departures from the normal sequence." *Ibid.*

The historical background of this case shows illegitimate motives on the part of the respondents. Hearing Officer Snider and Judge Matsch both noted the existence of facts showing improper motives and departure from the normal sequence of events.

> The district's treatment of this case in January, 1986 does not reflect an attempt to conduct a thorough, fair investigation. The process was, in reality, spearheaded by Dr. Aguayo, not by the building principal (which would be the normal approach). The investigation took only two days absent any contact with or, input from Romero, and Romero's discharge was almost a foregone conclusion.

Findings of Fact and Recommendation, App., *infra*, A119.

> After full discovery in this case, the plaintiff has produced enough evidence to support a finding that Albert Aguayo was motivated by the plaintiff's constitutionally protected conduct in causing an investigation of him which did not follow the normal procedural sequence.

Memorandum Opinion and Order, App., *infra*, A35.

The decision to discharge Romero cannot be examined in a vacuum. The context from which it arose must be scrutinized. *Professional Association of College Educators*, 730 F.2d at 266, specifically holds the inquiry is purely factual.

> . . . [D]id retaliation for protected activity cause the termination in the sense that the termination would not have occurred in its absence? It is not necessary that the improper motive be the final link in a chain of causation: If an improper motive sets in motion the events that lead to

> termination that would not otherwise occur, "intermediate step[s] in the chain of causation" do not necessarily defeat the plaintiff's claim. *Bowen v. Watkins*, 659 F.2d 979, 986 (5th Cir. 1982).

As in *Professional Association of College Educators*, the undisputed facts in this case show the individual respondents set in motion a procedure which virtually guaranteed Romero's ultimate and eventual discharge.

The district's policy of routinely terminating teachers subjected to the tenure dismissal process, *supra*, pp. 16-17, rendered Snider's findings of fact and recommendation irrelevant. Furthermore, as a matter of law, those findings and recommendation could not possibly serve to break the chain of causation between the district's decision to terminate Romero and the illegitimate

motive in initiating the process culminating in that termination, especially since the recommendation was merely advisory. C.R.S. § 22-63-117(10), App., *infra*, A132-A133.

The line of causation in this case is just as direct as that in *Saye v. St. Vrain Valley School District RE-1J*, 785 F.2d 862 (10th Cir. 1986). In *Saye*, a teacher brought a § 1983 action against the district and the principal alleging non-renewal of her teaching contract in retaliation for her union activities. The Tenth Circuit rejected the defendants' argument that since the school board members who voted to not renew her employment were unaware of her union involvement, the plaintiff's union activity could not have been the motivating factor behind her non-renewal.

The plaintiff had been harassed by her principal who had recommended a non-renewal to the superintendent. The superintendent was aware of the principal's actions, yet recommended non-renewal to the school board. The school board relied upon the superintendent's recommendation and voted not to renew the plaintiff's employment. The Tenth Circuit stated:

> Where this line of causation exists, and the principal or superintendent predicated their recommendations on constitutionally impermissible reasons, these reasons become the basis of the decision by the board members.

Saye, 785 F.2d at 878.

There might as well not have been a tenure hearing before an impartial administrative hearing officer in Romero's case since the district always terminates teachers charged and subjected

to the tenure dismissal process, *supra*, pp. 16-17. The individual respondents were aware that once an investigation and tenure review was initiated, Romero was as good as gone. The hearing officer and district court judge have both found improper motives in initiating the investigation. Thus, as in *Saye*, the constitutionally impermissible reasons for initiating the investigation became the basis of the decision of the board to terminate Romero.

An intervening judicial decision does <u>not</u> break the chain of causation between an actor's act and the acts' consequences, nor does it immunize the actor. *Malley v. Briggs*, *supra*, p. 25; *Professional Association of College Educators*, *supra*, pp. 29-30; *London v. Florida Department of Health and*

Rehabilitative Services, 448 F.2d 655, 657 (5th Cir. 1971), *cert. den.*, 406 U.S. 929, 92 S.Ct. 1765, 32 L.Ed.2d 131 (1972) (Whatever the conscious motivations of the individual members of the board, its decision to transfer London could remain discriminatory if founded upon testimony or evidence which was tainted by racial prejudice.); *Goodwin v. Metz*, 885 F.2d 157, 162 (4th Cir. 1989), *cert. den.* ____ U.S. ____, 110 S.Ct. 1812, ____ L.Ed.2d ____ (1990)(A prosecutor's decision to charge, a grand jury's decision to indict, a prosecutor's decision not to drop charges but to proceed to trial, none of these decisions will shield the police officer who deliberately supplied misleading information that influenced the decision.); *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988)(Same,

relying on *Malley v. Briggs* and *Monroe v. Pape*); *Rodriguez, et al. v. Comas*, 888 F.2d 899, 903 n14 (1st Cir. 1989), relying on *Malley v. Briggs* (The official's conduct must be evaluated independently of subsequent judicial approval.); and *Flores, et al. v. Pierce, et al.*, 617 F.2d 1386, 1391 (9th Cir. 1980), *cert. den.*, 449 U.S. 875, 101 S.Ct. 218, 66 L.Ed.2d 96 (1980)(The violation here consisted not in the ABC's initial denial of the license, but in the policy of the city officials to force the applicants to undertake extraordinary measures for its issuance . . . The evidence establishes that the defendant's protests were intended to, and did, cause the ABC to delay issuance of the license).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

HORNBEIN MacDONALD FATTOR and HOBBS P.C.

By _____

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APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 90-1185
(D.C. No. 87-M-6)
(D. Colo.)

EDWARD J. ROMERO,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
ALBERT AGUAYO, DONALD MOSER, JAMES SCAMMAN, and SCHOOL DISTRICT NO. 1, CITY AND COUNTY OF DENVER,	)
	)
Defendants-Appellees.	)

ORDER AND JUDGMENT*

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

Before **TACHA** and **EBEL**, Circuit Judges, and **VAN BEBBER**, District Judge.**

Plaintiff-appellant Edward Romero seeks recovery against defendants-appellees Albert Aguayo, Donald Moser, James Scamman, and School District No. 1 pursuant to 42 U.S.C. §§ 1983 and 1985. The district court granted summary judgment in favor of the defendants on all claims. We affirm.

Romero was a teacher at Henry Junior High School during the 1978-79 school year when there were racial difficulties, including a walkout by a number of Hispanic students. He was known to support the efforts of the Hispanic students at the school. Romero taught

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** The Honorable G. Thomas Van Bebber, District Judge for the United States District Court for the District of Kansas, sitting by designation.

industrial arts and served as the head wrestling coach at Manual High School. During the 1982-83 wrestling season, he was removed as coach because of a protest staged by his team at a wrestling meet. Romero amended his complaint in the ongoing state action, claiming this removal was also retaliatory.

Glenn Scheele, the wrestling coach at West High School, testified on plaintiff's behalf in state court. Less than a month later, defendant Aguayo, who was then principal at West High School, fired Scheele as the wrestling coach. Scheele successfully brought an action pursuant to 42 U.S.C. § 1983 based on this termination against several defendants, including Aguayo. Romero was subpoenaed to serve as a witness at this trial, but did not testify. Aguayo, who

was then assistant superintendent in charge of secondary education for the school district, saw Romero at the trial and questioned him concerning his attendance.

On the same day the jury returned its verdict in favor of Scheele, four Manual High School parents met the principal, defendant Donald Moser, to discuss their concerns regarding Romero's conduct. About two months later, Aguayo was contacted by one of these parents and agreed to meet with a group of parents. Moser was not informed of this meeting.

Four days after this meeting, Aguayo met with a security officer for the district and instructed him to investigate the parents' allegations against Romero. The next day, Aguayo sent a memorandum to James Scamman, the

district's superintendent, relating the events of his meeting with the parents. A week after Aguayo's meeting with the parents, Moser signed a memorandum prepared by Aguayo recommending Romero's discharge. Aguayo suspended Romero the next day and recommended his discharge to Scamman. Two weeks later, Scamman filed charges against Romero with the board of education, recommending he be dismissed for "insubordination, and/or neglect of duty and/or immorality and/or other good and just cause."

Pursuant to the procedures required by the Colorado Teacher Employment Dismissal and Tenure Act, Colo. Rev. Stat. § 22-63-101 et seq., a hearing was held before an officer in the Division of Hearing Officers of the Colorado Department of Administration. In his

report, the officer noted Manual's administrators were aware of "some fairly serious misconduct" buy Romero prior to the beginning of Aguayo's investigation in January 1986, but did not consider these actions grounds for discipline. The officer concluded, however, that Romero's conduct, including physical abuse, blackmail, and humiliation of students, justified his termination. On June 19, 1986, the board of education dismissed Romero.

Romero then filed this civil rights action against Aguayo, Moser, Scamman, and the school district. In count one, he alleged the defendants terminated him in retaliation for his exercise of his first amendment rights in violation of 42 U.S.C. § 1983. In count two, Romero asserted the defendants engaged in a

conspiracy to effect his dismissal in violation of 42 U.S.C. § 1985(2). The district court dismissed the school board from the section 1985 claim. The defendants then moved for summary judgment on all claims. The district court granted this motion.

We review a summary judgment under the same standard the district court applies pursuant to Rule 56. Osgood v. State Farm Mut. Auto. Ins. Co., 848 F.2d 141, 143 (10th Cir. 1988). In determining whether there is a genuine issue of material fact, the court views all facts and inferences in the light most favorable to the nonmoving party. Burnette v. Dow Chemical Co., 849 F.2d 1269, 1273 (10th Cir. 1988). A nonmoving party cannot survive a motion for summary judgment based on bare allegations in the

pleadings without supporting evidence. After adequate time for discovery, summary judgment is mandatory against a party failing to show the existence of an essential element of his case. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

To establish liability under section 1983, the plaintiff must demonstrate his exercise of protected rights was a "motivating factor" in the decision to terminate him. See Mount Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977). If the plaintiff makes this showing, the defendants will still prevail if they show by a preponderance of the evidence that the same decision would have been made regardless of the plaintiff's exercise of protected rights. Id.

In the present case, the district court concluded Romero failed to establish his exercise of protected rights was a motivating factor in the decision to terminate him. The district court relied heavily on the parties' stipulations in reaching its decision. In particular, it noted Romero agreed the board's decision was solely a result of the report of the hearing officer. The court concluded this broke the chain of causation between any improper actions on the part of any defendant and Romero's termination.

Prior to the court's entry of summary judgment, Romero attempted to be relieved from this stipulation. The court permitted him to conduct additional discovery on this matter. Romero discovered a newspaper article reporting

that a board member had said the board could consider matters beyond the administrative record in tenure dismissal proceedings. He argued the involvement of Daniel Bernard as special counsel for the board in relation to his termination stripped that proceeding of basic fairness. Romero noted Bernard was contacted by Michael Jackson, the individual who prosecuted the termination before the school board. Romero alleged Jackson somehow improperly influenced Bernard, who in turn improperly influenced the board. The district court concluded there was insufficient evidence on this point to allow Romero to escape from his prior agreement to the stipulation.

Based on our review of the record, we conclude the district court properly

found Romero presented no evidence indicating his exercise of protected rights played a motivating part in the board of education's decision to terminate him. Romero was discharged according to the statutory procedure based on the officer's recommendations. Romero admits there is evidentiary support for the officer's factual findings concerning Romero's misconduct. The district court properly concluded these findings "break the chain of causation between any retaliatory motivation by the individual defendants in their investigative and prosecutive roles and the discharge decision."

Romero was unable to demonstrate the board of education's decision to terminate him was influenced by anyone or anything except the officer's report. He

presented no material evidence supporting his allegations concerning improprieties in the board's handling of this case. Romero was terminated because of his repeated misconduct while employed by the school district. The defendants' retaliatory motivations, if they did exist, were not a motivating factor in this decision. Romero also failed to present any evidence supporting his conspiracy claim under section 1985(2). We **AFFIRM**.

ENTERED FOR THE COURT

Deanell Reece Tacha
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 87-M-6

EDWARD J. ROMERO,

Plaintiff,

v.

ALBERT AGUAYO, DONALD MOSER, JAMES SCAMMAN and
SCHOOL DISTRICT NO. 1, CITY AND COUNTY OF DENVER,

Defendants.

MEMORANDUM OPINION AND ORDER

MATSCH, Judge

The plaintiff seeks relief against all of the defendants pursuant to 42 U.S.C. § 1983, claiming that he was discharged from his position as tenured teacher because of constitutionally protected conduct including his advocacy of the rights of minority students and his support for a colleague, Glenn

Scheele, in Scheele's successful litigation against the defendant Albert Aguayo and the defendant school district in a previous cause, Civil Action No, 83-K-321. The plaintiff also claims against the individual defendants under 42 U.S.C. § 1985(2), alleging that they conspired to seek and procure his discharge because of his support of Scheele in the prior case. All of the defendants have moved for summary judgment of dismissal on these claims, contending that the evidence is insufficient to establish the violations and that the individual defendants could not be liable because the plaintiff was discharged in accordance with the applicable statutory procedure which provided him with a full evidentiary hearing before a hearing officer who made findings of fact upon

which the School Board acted in voting to dismiss Mr. Romero. In the amended stipulated pre-trial order, entered July 20, 1988, the parties agreed that the Board of Education voted to dismiss the plaintiff relying solely on the hearing officer's findings and recommendation. After oral argument on the motion for summary judgment, the plaintiff submitted a supplemental memorandum in opposition to the motion, contending that he should no longer be held to the stipulation because additional discovery, as permitted by the court, produced evidentiary support for the contention that the Board's decision was inappropriately influenced by an attorney, Daniel F. Bernard as "special counsel" who, in turn, was affected by his relationship to Martin Semple, the

attorney prosecuting the charges, and that the normal procedural sequence of charges, investigation, hearing and decision was not followed.

The historical facts in this case are not in dispute. What is contested is what inferences may be drawn from those facts and the legal significance of the role of the hearing officer in the Board's decision.

Romero was an industrial arts teacher at Henry Junior High School during the 1978-79 school year when there were racial difficulties, including a walkout by a number of Hispanic students. Romero was known as an advocate for Hispanic students. Romero was then transferred to Manual High School. He challenged that transfer in an unsuccessful grievance arbitration and then filed a civil action

in the Denver District Court, asserting that the transfer was disciplinary and in retaliation for his advocacy of the interests of Hispanic students. The school district was the sole defendant in that action.

In addition to teaching industrial arts, Romero was the head wrestling coach at Manual. He was removed as coach during the 1982-83 wrestling season by the Manual principal, Mary Gentile. The removal resulted from the refusal of Manual wrestlers at Kennedy at a match during the previous year. Romero included the removal in an amendment to his complaint in the Denver District Court and sought a preliminary injunction which was refused. Romero was supported in his effort to obtain the injunction by Glenn A. Scheele, the wrestling coach at

West High School. Scheele was a witness at the preliminary injunction hearing. The principal at West was then Albert Aguayo. Scheele gave his testimony on January 12, 1983, and Aguayo fired him as the wrestling coach on February 22, 1983. Scheele then brought suit against Aguayo, the assistant principal Seick, Robert Conklin, the district's athletic director, and the District in Civil Action No. 83-K-321 in this court. That case was tried and the jury returned a verdict for Scheele on November 15 1985, in the amount of $100,000.00 on his claim under 42 U.S.C. § 1983. The judgment entered on the verdict was satisfied. Although he did not testify as a witness, Romero attended the Scheele trial in support of his friend and Aguayo saw Romero there. At that time, Aguayo was

assistant superintendent in charge of secondary education for the entire school district and Donald Moser was principal at Manual.

On the day the jury returned its verdict for Scheele, the parents of two Manual High School students met with Moser to voice their concerns about Romero's inquiries into the relationship of these two students, a boy and girl. In early January the girl's parents called Aguayo who then met with a group of parents in a private home on the evening of January 23, 1986. Moser was not notified about this meeting and he did not attend it. Aguayo was accompanied by Robert Conklin, a co-defendant in the Scheele case. On Monday, January 27, 1986, Aguayo and Conklin met with Lou Lopez, a security

officer for the district, assigned by Aguayo to investigate the parents' allegation against Romero. Lopez then met with Moser on the same day. On January 28, 1986, Aguayo and Conklin sent separate memoranda to Dr. Scamman, then the District's superintendent, relating the events of the meeting with the parents on January 23, 1986. On the evening of January 28, 1986, Romero called Moser at home to inquire about an investigation and Moser said that he was not the one doing the investigation and that it was the result of the complaints from parents.

On January 30, 1986, Moser, in the form of a memorandum written by Aguayo for Moser's signature, recommended that Romero be discharged. On January 31, 1986, Aguayo suspended Romero "pending

completion of an investigation" and, on the same day, Aguayo recommended Romero's discharge to Scamman. On February 14, 1986, Superintendent Scamman filed charges against Romero with the Board of Education and recommended that Mr. Romero be dismissed "on the grounds of insubordination and/or neglect of duty and/or immorality and/or other good and just cause" based on 25 paragraphs of factual allegations. The Colorado Teacher Employment Dismissal and Tenure Act, C.R.S. 22-63-101, et seq. governs the procedure for the dismissal of a tenured teacher. The grounds set forth in Dr. Scamman's letter are among the statutory grounds in C.R.S. 22-63-116. Pursuant to the procedure required by C.R.S. 22-63-117 a hearing on the charges was held before Hearing Officer Marshall

A. Snider of the Division of Hearing Officers of the Department of Administration of the State of Colorado, who entered his finding and recommendations on May 21, 1986. While the hearing officer determined that some of the factual allegations in the Scamman letter were not proved, he found that there was adequate factual support for each of the four grounds for dismissal. The recommendation made by the Hearing Officer was as follows:

RECOMMENDATION

> After a hearing the District's Board of Education may dismiss or retain a teacher or place him on one year's probation. C.R.S. 22-63-117(1)d. The Hearing Officer however, is limited to one of two recommendations: dismissal or retention. C.R.S. 22-63-117(8).
>
> This case involves instances of physical abuse of students, violation of

interscholastic wrestling rules, humiliation of students, disruption to the school community, blackmail of students, promoting negative rather than positive social conduct and other causes for discipline. It is difficult to consider this catalogue of misconduct and recommend any action other than dismissal.

In making this recommendation the Hearing Officer has considered that as of January 28, 1986 Manual's administrators were cognizant of some fairly serious misconduct (see footnote 7) which they did not consider ground for discipline. Still, the cumulative effect of all the proved conduct cannot be ignored.

This Hearing Officer has also considered Romero's assertions that he is the subject of a vendetta by Dr. Aguayo. The District's treatment of this case in January, 1986 does not reflect an attempt to conduct a thorough, fair investigation. The process was, in reality, spearheaded by Dr. Aguayo, not by the building principal (which would be the normal approach). The investigation took only two days, absent any

contact with or input from Romero, and Romero's discharge was almost a foregone conclusion. Nevertheless, he has had his day in court in this hearing and the cumulative nature of the offenses warrants dismissal, regardless of what Dr. Aguayo's motives may have been.

Romero's conduct known prior to January 28, 1986 warranted no more than a discussion with the teacher in the minds of Manual's administrators. In January, no consideration was given to warnings or to remediation of Romero's deficiencies. Romero is a competent, dedicated coach who is motivated by a desire for excellence from his charges and who is concerned with his wrestlers. In most cases, the Hearing Officer believes Romero's motives regarding his students were proper; unfortunately, his methods tended to be aggressive and heavy-handed. Considering these mitigating factors, the District's Board of Education may want to consider whether the option of a one year probation is appropriate. The Hearing Officer, however, has no such opinion. On balance considering the nature of his conduct, the Hearing Officer

recommends that Romero be dismissed.

Exhibit A to Defendant's Motion.

The plaintiff has asserted two claims for relief. The first claim is that the individual defendants conspired to cause the plaintiff's discharge because of his attendance at the Scheele trial in violation of 42 U.S.C. § 1985(2). The second claim for relief is that all of the defendants are liable under 42 U.S.C. § 1983 because they caused his discharge for constitutionally protected conduct in his persistent advocacy of the rights of minority students and because of this participation and support of his colleague coach, Scheele in the Scheele litigation against the district. Both claims fail because the plaintiff was

discharged according to the statutory procedure based on the findings and recommendations of the Hearing Officer as a result of a fair hearing in which the plaintiff and his counsel had full participation. Mr. Romero has not challenged the findings of fact and conclusions of law made by Marshall Snider and the plaintiff did not exercise his right of judicial review in the Colorado Court of Appeals as provided in C.R.S. 22-63-117(11).

In making its decision on discharge, the Board of Education was limited to the administrative record before the Hearing Officer. Norton v. Board of Education of Jefferson County, 748 P.2d 1337 (Colo. App. 1987) (cert. denied). Plaintiff has conceded the fairness of the administrative hearing and the

evidentiary support for the factual findings made by the Hearing Officer. It has previously been determined in this case that the findings of the Hearing Officer do not have preclusive effect under the doctrine of res judicata because the Hearing Officer could not completely resolve the claims that have been asserted. What they did, however, is break the chain of causation between any retaliatory motivation by the individual defendants in their investigative and prosecutive roles and the discharge decision.

There is nothing to suggest that the evidence relied upon by the Hearing Officer in making his findings was fabricated or tainted by the conduct of the individual defendants. This flaw in the plaintiff's cause was discussed at

the oral argument on the defendant's motion for summary judgment. After the argument, the plaintiff was given permission to conduct additional discovery and to be relieved from the stipulation in the pre-trial order that the Board relief solely on the Hearing Officer's finding and recommendation in voting to dismiss the plaintiff. That effort was initiated as a result of a newspaper article reporting that a Board member had said that the Board could consider matters beyond the administrative record in tenure dismissal proceedings.

After that discovery was completed, the plaintiff filed a supplemental memorandum in opposition to the defendant's motion for summary judgment. The plaintiff asserts that Daniel F.

Bernard acted as "special counsel" to the Board in its consideration of the discharge decision. Mr. Bernard was formerly with the firm of Henry, Cockrell, Quinn and Creighton when that firm represented the defendant school district. At that time, Michael Jackson was a partner in the firm. Mr. Jackson contacted Mr. Bernard to ask if he would serve as independent counsel to the Board in this and another Teacher Tenure Act matter. Mr. Jackson is now a partner of Martin Semple who prosecuted the discharge action before the Board. A representative of the school district contacted Mr. Bernard concerning the request of plaintiff's counsel to present oral argument before the Board prior to its determination. Mr. Bernard discussed that issue with Mr. Semple. Mr. Bernard

met with the School Board, in private, before the meeting at which the discharge was discussed and Mr. Bernard told the Board that in his opinion the Board was not required to grant the request for oral argument. Mr. Bernard also forwarded two confidential memoranda to the Board which are Exhibits 5 and 6 to the plaintiff's supplemental memorandum. Mr. Bernard also prepared the "Recitals and Orders of Dismissal" which the Board adopted. When the Board met to decide the question of discharge, the only documents before the Board were the Hearing Officer's findings and recommendation and written presentation by plaintiff's counsel and by Mr. Semple.

From these facts, the plaintiff argues that the dismissal proceeding should be "stripped of the appearance of

basic fairness" and should be subject to collateral attack. This court is then asked to submit to a jury the question whether the plaintiff's constitutionally protected conduct was a "substantial factor" or a "motivating factor" in the Board's termination decision.

The additional information obtained through supplemental discovery is not sufficient to demonstrate that the members of the Board of Education were motivated by the plaintiff's advocacy of the rights of minority students or his involvement in the trial of Glenn Scheele. In Weissman v. Board of Education, 547 P.2d 1267 (Colo. 1976) the Colorado Supreme Court cautioned that the attorney acting as prosecutor in tenure dismissal proceedings should take no part in the Board's deliberations, thereby

avoiding any appearance of impropriety or unfairness. Mr. Jackson contacted Mr. Bernard to serve as independent counsel to meet the directions of that case. There is no basis for any inference that Mr. Bernard was influenced by Mr. Jackson's contact with him and there is nothing to show any impropriety by Mr. Bernard in his contacts with the Board. Mr. Bernard's advice concerning oral argument is supported by the decision of the Colorado Court of Appeals in Norton v. Board of Education, Jefferson County, 748 P.2d 1337 (Colo. App. 1987)(cert. denied). In deKoevend v. Board of Education of West End School District RE-2, 688 P.2d 219 (Colo. 1984) the Colorado Supreme Court held that the Hearing Officer's evidentiary findings are binding on the Board of Education if they

are supported by substantial and competent evidence in the record. The Board must then make the ultimate findings, based on that record. In making its ultimate findings, based on that record. In making its ultimate findings, the Board must respect the principle of due process requiring the appearance of fairness. There is no evidence submitted by the plaintiff that the Board violated that duty in this case. While Mr. Bernard prepared the ultimate findings adopted by the Board, he submitted alternative findings which the Board could use if it disagreed with the recommendation of the Hearing Officer or found that his findings were not supported by the record.

In this court's view, the plaintiff has failed to produce evidence to support

his contention that the Board's action had sufficient appearance of impropriety to constitute a denial of due process under Colorado law. Additionally, the deposition testimony of four Board members was that each of them made a decision based solely on the record before the Hearing Officer.

The plaintiff's claim under section 1985(2) is that the individual defendants conspired to injure him because of his attendance at the Scheele trial. The evidence does not support that claim. There is nothing to show that the defendants Moser and Scamman conspired with Aguayo to procure the plaintiff's discharge. Moreover, since Romero was not a witness at the Scheele trial, coverage of this claim by section 1985(2) is questionable.

After full discovery in this case, the plaintiff has produced enough evidence to support a finding that Albert Aguayo was motivated by the plaintiff's constitutionally protected conduct in causing an investigation of him which did not follow the normal procedural sequence. The plaintiff has failed to present evidence to support a finding that Aguayo's actions caused the plaintiff' discharge and he has failed to support his allegations of improper conduct by other defendants. The plaintiff's own evidence shows that he lost his job because the facts found by the Hearing Officer after a fair hearing established statutory grounds for his dismissal and that the Board's decision was a valid exercise of discretion. Accordingly, it is

ORDERED that the defendants' motion for summary judgment is granted and the Clerk shall enter judgment dismissing this civil action and awarding costs to the defendants.

Dated: May 29, 1990

BY THE COURT:

Richard P. Matsch, Judge

BEFORE THE DEPARTMENT OF ADMINISTRATION
STATE OF COLORADO

CASE NO. TA 86-01

FINDINGS OF FACT AND RECOMMENDATION

IN RE: TENURE ACT PROCEEDINGS:

DENVER PUBLIC SCHOOL DISTRICT NO. 1

v.

EDWARD J. ROMERO

This case arises under the Teacher Employment, Dismissal and Tenure Act of 1967, C.R.S. 22-63-101 et seq. Charges were filed against the teacher, Edward J. Romero ("Romero"), a tenure teacher in School District No. 1, Denver Public Schools ("the District") on February 14, 1986. The Board of Education accepted the charges on February 20, 1986 and a hearing was held pursuant to C.R.S. 22-63-117.

Hearing was held before Marshall A. Snider, a Hearing Officer selected by the parties pursuant to C.R.S. 22-63-117(5), on April 24, 25, 28, 29 and 30, 1986.[1] The District was represented by Martin Semple, Esq. and James N. Stamper, Esq. Romero was represented by Larry F. Hobbs, Esq. and Vonda G. Hall, Esq.

The Hearing Officer hereby makes Findings of Fact and Recommendation as required by C.R.S. 22-63-117(8). The parties have waived the requirement that the Findings of Fact and Recommendation be adopted in open session.

PRELIMINARY MATTERS

Two preliminary matters were ruled upon at the commencement of the hearing.

1. The District's Motion to Close Teacher Tenure Hearing was denied. In the Hearing Officer's opinion, C.R.S.

22-63-117(6) does not mandate a closed hearing simply on the request of a party; the statute leaves the matter of whether to close the hearing to the discretion of the Hearing Officer. In this case, no sufficient grounds exist to close the hearing.

2. The District's Motion in Limine to Limit Testimony and Inquiry Regarding Student Witness' Medical Condition was granted. The medical condition of the student involved is irrelevant and did not affect the credibility of the student or of any other witness. The medical records were reviewed by the Hearing Officer in camera; the records have been sealed and preserved for the record.

ISSUES

The charges filed against Romero contain 27 paragraphs of specifications.

At the hearing both parties produced evidence, without objection, as to a number of actual matters not contained in these charges. For the most part these additional factual issues were collateral to facts actually charged or were raised to establish a context, pattern or motive for Romero to have committed some of the acts charged. The Hearing Officer has considered all of the evidence in arriving at the Findings of Fact, even if a specific finding has not been made on some of these collateral matters.

FINDINGS OF FACT

1. Romero has taught industrial arts, drafting and crafts in the District since 1974. With one interruption in 1983 he has been the wrestling coach at Manual High School ("Manual") since 1981.

2. On January 31, 1986 the District placed Romero on leave with pay from both his teaching and coaching duties, as a result of the matters involved in these charges. At that time the interscholastic wrestling season for 1985-86 was approximately 3 weeks short of completion.

3. When Romero began coaching wrestling at Manual the wrestling program was small, not competitive and poorly regarded. By the 1985-86 season participation had grown to 47 students (compared to 7 in 1981), its wrestlers were competitive and the team had a respectable won-loss record.

4. Student Kevin L. wrestled at Manual for two years, beginning in November, 1983.[2] Kevin did not go out for wrestling for the 1985-86 season.

Prior to November 15, 1985 Romero called Kevin out of class approximately 5 times to talk to Kevin and try to convince him to return to the wrestling team. Kevin never indicated to Romero a desire to wrestle in the 1985-86 season.

5. The wrestlers on the Manual team often teased each other about their actual, claimed or reputed sexual activities. Romero's response to the teasing often was to join in with it. When team members teased a wrestler about whether he was having sexual relations, Romero's approach was to have the wrestler admit that he was doing so, so that the teasing would stop and the wrestlers could continue with practice.

6. On one occasion in December, 1984 the team was teasing Kevin L. about whether he was having sex with his

girlfriend. Romero called Kevin over during wrestling practice and asked him, in the presence of other wrestlers, if he had sex with his girlfriend. When Kevin said he had not, Romero grabbed Kevin's hair in the back and pulled on it until Kevin stated he had had sex with his girlfriend.

7. On two occasions prior to November 15, 1985 Romero talked with Kevin's girlfriend, Mindi A., after Kevin had lost a wrestling match. In the presence of Mindi's friends Romero told her that Kevin lost his matches because Mindi was causing Kevin to be sexually frustrated. While Romero (and Mindi's friends) considered that the conversations with Mindi were teasing or joking, Mindi was upset and embarrassed by these comments. Mindi was 15 years

old at the time of the first incident. On one occasion Romero made a reference to Mindi preferring Romero over Kevin. That statement was made and received as a joke.

8. In the fall semester, 1985 there were wide-spread rumors at Manual that Mindi was pregnant and that Kevin was the father. Mindi and Kevin themselves made that statement to their friends. Romero heard these rumors and was also told of Mindi's possible pregnancy by Kevin and by Mindi's father, a fellow teacher at Manual.[3]

9. Romero subsequently asked to talk to Mindi while Mindi was in a class in the library, without the consent of Mindi's teacher. Romero discussed the possible pregnancy with Mindi and stated that if Mindi were pregnant it would be

best if Kevin returned to wrestling and went on to college. Mindi had never approached Romero to discuss this problem and she told him it was none of his business. Mindi's teacher then called Mindi back to class.

10. Romero also talked to Kevin about Mindi's possible pregnancy. Romero attempted to convince Kevin to return to the wrestling team (apparently as a way to get to college). Romero also offered to let Kevin stay at Romero's home if the matter of Mindi's pregnancy caused problems between Kevin and his parents.

11. In January, 1985 four of Romero's wrestlers, including Kevin L., went to a commercial sauna outside of class time to lose weight the day prior to a match. Romero knew they were going to the sauna. He told them that, if

asked, they should state they were 18 years old (none of the wrestlers were yet 18)). Use of artificial heating devices for weight loss was prohibited by the rules governing interscholastic wrestling.[4]

12. While Romero told at least one of the wrestlers not to go to the sauna, and that it was against the rules, he also told the students that he could not tell them what to do and that if they went he did not want to know about it. Romero considers the rule to be violated only if he directs a wrestler to use an artificial device for weight loss or sees a wrestler using the device.

13. The evidence did not establish that Romero lied to Kevin's employer about why Kevin would miss work that

night, or that he instructed his assistant coach to do so.

14. Romero's relationship with his wrestlers was one of authority and discipline. He had the ability to discipline wrestlers for violation of the rules had he chosen to do so.

15. On November 15, 1985 the parents of Mindi and Kevin called the Manual principal, Donald Moser ("Moser") and requested an urgent meeting. The meeting was held that day. Farrell Howell ("Howell"), an assistant principal, attended the meeting along with the parents of Kevin L. and Mindi A.'s mother and step-father.

16. The parents of Kevin and Mindi expressed a number of concerns at this meeting. Of great importance was the issue of Mindi's possible pregnancy and

how that would affect the continued education of Mindi and Kevin. The parents also expressed concern regarding the following matters involving Romero:

A. Kevin had been taken from class to discuss wrestling.

B. The perceived harassment of Kevin and Mindi regarding Mindi's possible pregnancy (including Mindi's being called out of the library).

C. The incident in which Romero pulled Kevin by the hair.

D. Kevin's use of a sauna to lose weight.

17. As a result of this meeting the following matters were determined.

A. Mindi, a senior, could complete her required work by taking 10 hours of independent study. As it turned out, Mindi was not pregnant, but she

chose to do the independent study rather than return to Manual and she is expected to graduate on time (while the confrontations with Romero disturbed Mindi, her primary reason for not returning to school was the rumors of her pregnancy and abortion).

B. Kevin, a junior, could transfer to East High School. He chose to stay at Manual.

C. Moser would talk to Romero and instruct him not to have any further contact with Mindi or Kevin.

18. Moser testified that on November 18, the following Monday, he instructed Romero to have no further contact with Kevin or Mindi. The Hearing Officer finds, however, that this instruction was made well after November 18. In any event, Romero's contacts with

Mindi had ceased by November 18 and his contacts with Kevin were quite limited.[5] Romero's only contact with Kevin or Mindi after being instructed not to do so by Moser was on January 29, 1986 and was related to the investigations of the charges (see paragraph 69 of the Findings of Fact).

19. On November 22, 1985 Romero had his wrestlers running sprints up and down the hallways, after school. Two wrestlers reported to Romero that Jimmy G., a student who worked sweeping floors after school, had deliberately tripped one of the wrestlers with his broom. Romero did not witness the incident. Romero confronted Jimmy G. and told him that if he (Jimmy G.) hurt one of Romero's wrestlers Romero would "break your god damn back."

20. Jimmy G. reported this incident to Moser. Moser met with Romero, Jimmy G., Jimmy's older sister and Howell. Romero apologized to Jimmy for the remark and Moser considered the matter resolved.

21. On January 23, 1986 Mindi A.'s mother telephoned Dr. Albert Aguayo ("Aguayo"), the District's Assistant Superintendent for Secondary Education. Aguayo was asked to attend a meeting of students and parents that night at the home of Mindi's parents, to discuss the possible removal of Romero from his coaching position. While it was unusual for an administrator to attend a meeting at a parent's home on such short notice,[6] Aguayo attended this meeting along with Robert Conklin, the District's Director of Athletics and Student Activities.

22. The January 23 meeting was attended by Aguayo, Conklin, the parents of Kevin and Mindi, Mindi A., Kevin L., his brother Brian L. (a former student and manager of the wrestling team), student Tim N. and his mother, and the father of student Jeff H.

23. The matters previously discussed with Moser and Howell on November 15, 1985 were again brought up at this meeting. However, these matters appeared to have been resolved by January 23, 1986 and this latter meeting was motivated by rumors of other alleged improprieties by Romero.

24. Besides the matters discussed on November 15, the following allegations were raised on January 23.

A. Romero had taken some wrestlers to a wrestling camp in Iowa but

all but one student had to return to Denver before getting to the camp.

B. Romero had posted a photograph of a wrestler losing a match in Manual's central display case, along with a derogatory caption.

C. Romero had deliberately broken mirrors used by the dance class.

D. Romero had deliberately picked up a student and dropped him on his head.

E. Romero had thrown a wrestling time clock at a wrestler.

F. Romero had used corporal punishment on students.

25. As a result of the January 23 meeting Aguayo met with Moser and Howell on January 28, 1986 and advised Moser that it was his responsibility to investigate the allegations against

Romero. Prior to January 28 neither Moser nor Howell felt that the matters regarding Romero of which they were aware required dismissal or discipline of Romero.[7] The investigation ultimately resulted in the filing of these charges.

26. After the interscholastic wrestling program and during the summer Romero has conducted a freestyle wrestling program. The freestyle program is useful to serious wrestlers who have the ability to compete for titles or to receive college scholarships. This program is not connected with the District's academic or athletic programs and does not use District facilities. The District contributes nothing to the freestyle program. Romero has formed a club (the Lightning Bolt Club) to participate in the freestyle program.[8]

Romero provides the coaching, transportation, facilities and his own funds to support the club (as well as to buy personal items for the students when they go on trips) and is not paid for his efforts with the club.

27. The wrestlers in the Lightning Bolt Club developed their own code of discipline for club members. Romero was aware of this code and participated in its development. Romero felt that this code was needed to ensure proper behavior of these students, some of whom were disciplinary problems or members of street gangs. Wrestlers who violated a rule were subject to being struck by other wrestlers with a weight-lifting belt on their buttocks. Most often, this occurred in Romero's home. Romero was present at the times such discipline was

imposed and described his role as insuring that no one was hit too hard and that no one was hurt. There was no evidence that Romero restrained wrestlers while they were struck by other students. The discipline code did not apply to the interscholastic wrestling program at Manual.

28. On a Lightning Bolt Club trip to Grand Junction Romero proposed to discipline student Robert W. for lying. Romero gave Robert the option of missing dinner or being strapped with a belt. Robert chose to be hit and Romero struck him on the buttocks five times with the belt from his trousers. Robert did not consider the hits to be hard and joked about the event.

29. There was no evidence that Romero ever struck a student with a paddle or participated in such conduct.

30. Romero did, on one occasion, throw a set of keys at Robert W. and hit Robert in the stomach. Robert W. acknowledged that he was "talking smart" to Romero. Romero apologized to Robert for his conduct.

31. On one occasion Romero placed his foot on Robert W.'s head to demonstrate a wrestling move. This conduct did not constitute discipline or corporal punishment and there was no evidence that such a demonstration was unwarranted, harmful or constituted excessive or unnecessary force.

32. At all relevant times the District had detailed policies requiring the following controls or limitations in

the administration of corporal punishment; written request or permission of a parent or guardian is required; a thorough investigation must be made before such punishment is administered; corporal punishment must never be used as a first line of discipline; and punishment must be administered in the presence of a second school official or teacher. None of these requirements were met in the punishment described in paragraphs 27, 28 and 30 of these Findings of Fact.

33. The District's corporal punishment policies apply to the normal school day and activities directly related to the instructional program, including both curricular and extracurricular activities. While these policies apply to athletic programs, they

did not apply to the Lightning Bolt Club, which was an activity wholly unconnected with the District.

34. In the summer of 1985 Romero took twelve wrestlers to a wrestling camp as part of the freestyle program (the Lightning Bolt Club). Romero told the wrestlers that the camp was in Iowa and that there would be no cost to them to attend.[9]

35. To permit the wrestlers to go to the camp at no cost Romero and his girlfriend agreed to work at the camp.

36. Before going to Iowa the team stopped at Fowler, Colorado where the wrestlers were for the first time told that to attend the Iowa camp they had to wrestle in a tournament and that only those who qualified would go to Iowa; the remainder had to return to Denver. Only

one of Romero's wrestlers qualified. Four wrestlers did not make weight and were not allowed to wrestle at all. At wrestling camps, which are designed for coaching, there is no requirement that a wrestler make weight (i.e., wrestle at about a particular weight); at competitive tournaments there is such a requirement.

37. Romero had planned to drive the non-qualifying wrestlers back to Denver, then to return to Fowler and to proceed from there to Iowa. The day before he was to depart Fowler he learned of a change in schedule which would make it impossible to drive to Denver and still return to Fowler in time to leave for Iowa with the rest of those continuing on. Romero went on to Iowa because he had agreed to work at the camp. Romero

purchased bus tickets for the returning wrestlers, accompanied them to the bus and waited until the bus left for Denver.

38. The four wrestlers who did not make weight were required to buy their own bus tickets (about $11 each) and to return the wrestling singlets that all the other wrestlers were given (Romero had paid for the singlets). Romero felt that it was irresponsible for these wrestlers to make the trip but to not make weight. One of the four had to borrow $11 from a friend. Romero paid for another wrestler's ticket but required that student to give his boots to Romero as collateral. This student paid Romero back and his boots were returned.

39. Romero did not tell the students in advance of the trip that if

they did not make weight they would have to pay their own way back to Denver or return the singlets.

40. Romero did not discuss the Iowa/Fowler trip directly with any parents. However, parents were aware that Romero was to accompany the students on the trip.

41. During the 1984-85 school year Jeff H., a student in Romero's drafting class and a wrestler, initiated some horseplay with Romero while in Romero's class. In the course of the incident Jeff fell to the concrete floor. Romero did not pick up Jeff or drop him on his head. The incident was reported to then Manual assistant principal Fred Applewhite who investigated the matter and found that no culpable act had been committed by Romero.

42. In January, 1986 Romero had a photograph showing one of his wrestlers, Tim N., being pinned by an opponent. Romero placed this photograph in the main display case at Manual, where it could be seen by students and staff. Beneath the photograph Romero placed a caption that read "Tim N. being pinned at Kennedy. Is it quitting time?"

43. Romero placed the photo and caption in the display case as a means to motivate Tim and to illustrate Romero's teaching to his wrestlers that when they are being pinned they should not quit. Tim was embarrassed by the photograph. He complained of the photograph and caption to Manual's activities director and they were removed.

44. A dance class shared the room where the wrestling team practiced and

large mirrors covered the walls in that room, for the use of the dancers. A school dance was held in this room on the evening of Friday, November 22, 1985 and the mirrors were broken sometime that evening. Subsequently, either to test the mirrors to see if they would break if hit by a wrestler, or while putting his feet up near the mirrors while resting, Romero accidentally or negligently caused the cracks in the mirrors to become elongated.

45. Howell questioned Romero about the broken mirrors on Monday, November 25. Romero denied any knowledge of the cause of the damage. The evidence does not establish that this conversation occurred after Romero aggravated the breakage.

46. During the 1983-84 school year, at a wrestling practice, student Alex B. was not moving as fast as Romero wanted him to move. Romero threw a wrestling time clock in Alex' direction. The clock hit the wall about 3 or 4 feet from Alex and the glass face of the clock shattered. Romero had the glass cleaned up and practice continued. No one was injured by broken glass.

47. Romero threw the clock at Alex to motivate him. He told Alex to bring the broken clock to practice each day as a reminder to move faster when Romero told him to do so. Alex felt he was being used by Romero's motivational technique and quit the team.

48. The broken time clock was owned by Romero and was not District property.

49. At a wrestling practice during the 1984-85 season a stop watch flew out of Romero's hand while he was waving his arms near Tim N. (who Romero was trying to get to run faster in place). The watch hit a few feet from Tim's feet and broke. Romero was the owner of the watch; it was not District property. Romero claims this incident was an accident and Tim felt the watch was thrown deliberately. The Hearing Officer finds that the watch was not thrown deliberately at Tim.

50. During the 1984-85 wrestling season, on the morning of a wrestling match, Romero instructed Kevin L. to go to West High School to use a whirlpool to treat Kevin's injured knee.[10] Kevin left Manual at approximately 7:45 a.m. and did not return until about noon. Kevin

missed several classes in that time period. Kevin's parents had not granted permission for Kevin to miss classes for this reason. Use of the whirlpool during class time was an attempt to get Kevin ready for that day's meet; such use was not medically necessary.

51. Other students accompanied Kevin to the whirlpool. There was insufficient evidence that Romero directed these students to use the whirlpool for artificial weight reduction purposes.

52. Romero was aggressive in his attempts to convince students who quit the wrestling program to return to the team. He would talk to a wrestler who did so and encouraged other team members to talk to that student.

53. Wrestler Julian A. left the team in the 1984-85 season. Romero urged the team to get Julian back and stated that they should "kick his butt" or "get him" or words to that affect.

54. Julian was subsequently assaulted by another wrestler, Antonio R. This assault was related to a personal quarrel between Julian and Antonio R., not to any directions from Romero. However, Antonio (along with other team members) had urged Julian to return to the team.

55. In one discussion with Julian about leaving the team Romero grabbed Julian and threw him against a locker. Romero once called Julian out of a class to discuss his leaving the team.

56. Julian left school before graduation. Part of his reason for doing

so was because the other wrestlers kept on him about quitting the team. However, Julian's school work and attendance were very poor as well and his leaving school cannot be attributed to Romero's conduct.

57. Student Jeff H. left the wrestling team during the 1984-85 season. Other wrestlers talked to him about that. On one subsequent occasion other wrestlers held Jeff's head under a water faucet. There was no evidence connecting Romero with this incident.

58. Student Robert W. left the wrestling team in the 1985-86 season. Romero tried to convince Robert to return to the team. Romero reported to Robert that Romero had found marijuana in Robert's athletic gear and that if Robert did not wrestle Romero would report him to the school authorities for possession

of drugs. Romero never reported Robert's alleged drug possession to the school since he had not seen Robert use the drugs.

59. Student Shawn G. left the wrestling team. Romero did not send another wrestler (Antonio R.) after Shawn for doing so.

60. There was no evidence that Romero directed students to lie about their weight at wrestling matches or to compete in a weight class lower than that allowed.[11] Romero did not tell a wrestler that he would lie to officials about the wrestler's weight.

61. Subsequent to the trip to the Iowa wrestling camp Romero confronted Tim N. about Tim's not selling the bumper stickers needed to defray the cost of the

trip. Tim refused to sell the stickers and Romero told him that if he did not do so Romero would put the price of the stickers on Tim's senior bill, so that he would not graduate until that amount is paid. This argument occurred in front of Tim's football teammates and Tim felt embarrassed by it.

62. On several occasions Romero made statements to Tim N. about Tim's sexual relations with his girlfriend. Romero did not imply a sexual relationship between Tim and his Sunday school teacher.

63. On January 15, 1986 a .45 caliber bullet was found by James Hoops ("Hoops") in his mailbox at Manual. Hoops was Manual's football coach and there was some friction between Romero and Hoops. Howell called the police

regarding this incident and Romero was summoned to Howell's office without explanation; only when he arrived did Romero learn he was to talk with the police. The police told him what they were investigating and advised Romero of his rights.

64. No connection has been established between Romero and the placing of the bullet in Hoops' mailbox.

65. Romero was very agitated by the incident involving the bullet and the police interrogation. He felt that it was unfair he should be accused and that he was treated shabbily by being summoned to the office for the police investigation without being advised of what was going on. After the police left, Romero told Delores Payne, the school secretary, that he would "get"

anyone who messed with him, including Mrs. Payne. Payne reported this comment to Moser who considered the comment to be just talk, not serious. Moser took no action about Romero's comment.

66. Later on January 15 Romero, still angry and upset, talked to assistant football coach Terry Senier ("Senier"). Romero accused Hoops of being responsible for the "bullet incident" and of interfering in Romero's business. In the course of this discussion Romero appeared desperate. He made reference to Hoops' wife and children and told Senier to tell Hoops he (Romero) would "get" him (Hoops). Senier passed this statement on to Hoops. The statements made to Senier amounted to a threat to Hoops and could reasonably be

interpreted as well as a threat to his family.

67. On January 26, 1986 Romero called the father of Mindi A. to inquire if he knew what his ex-wife (Mindi's mother) was doing regarding Romero. Romero stated that if Mindi's mother took him to court he would "go all the way with it".

68. On January 28, 1986 Romero called Tim N. and asked if Tim knew anything about someone being out to get his job. Tim told Romero he did not want to talk about it, but Romero asked Tim about a statement Tim had given to the District.

69. On January 29, 1986 Romero asked Kevin L. why Kevin had done "all this" to Romero.

70. On January 31, 1986, Romero was advised by a letter from Aguayo that he was being placed on leave with pay. Romero was instructed in this letter not to interfere with the investigation of the allegations against him nor to have direct or indirect contact with administrators, staff, teachers or students.

71. On February 5, 1986 Romero again called Mindi A.'s father. In this conversation Romero stated that he would do anything he had to do to save his job and that if the matters between the District and Romero went to litigation, Mindi's personal problems would be exposed and she would be hurt. While Romero claims that he was only trying to protect Mindi, the Hearing Officer find

that his remarks constituted a threat against Mindi.

72. Romero did not ask Rudy Carey (another teacher) to give a message to Mrs. Payne that Romero would "get" her and others. Romero did not tell Carey to tell Payne that Romero had a "hit list" or that there would be a "blood bath" (in fact, Carey did not make these statements).

73. The investigation of the allegations against Romero consisted of the obtaining of witness statements on January 28 and 29. The statements were obtained by an investigator assigned by Aguayo, who was usually accompanied by Howell or Moser. By January 29, Moser had decided to recommend to Aguayo that Romero be terminated. At this point Romero had not been asked to give a

statement nor had he been given an opportunity to respond to the allegations.[12]

74. On January 30, Moser called Aguayo with his recommendation of dismissal. Aguayo asked for the recommendation in writing, but Moser said he did not know how to write up such a recommendation (even though Moser had been an administrator in the District for 20 years). Aguayo therefore offered to draft a recommendation which he based, at least in part, on the witness statements. Moser adopted Aguayo's draft without change.

75. On January 31, 1986 Romero and his attorney were to meet with Aguayo and the District's counsel. The meeting never occurred because Romero's attorney refused to proceed absent a stenographic

record being made and the District refused to proceed if such a record were made.

76. While Romero would have been given a chance to respond to the allegations had the January 31 meeting been held, he would have had to do so that day. In fact, Aguayo intended to place Romero on leave on January 31 regardless of what Romero had said. The letter from Aguayo to Romero on January 31 stated that he was placed on leave "pending completion of an investigation" and ordered Romero "not to interfere with the investigation". In fact, the investigation was concluded by January 30 and Aguayo had already decided to recommend institution of these proceedings for dismissal. Neither the January 31 meeting nor the January 31

letter was calculated to obtain a response from Romero that would have been considered by the District.

77. Romero was placed on leave approximately three weeks before the city wrestling meet. Moser considered the effect of this action on the wrestlers. Moser nevertheless felt immediate action was required.

78. Prior to 1984 Romero had been involved in litigation against the District on behalf of himself and another teacher. The suit by the other teacher resulted in a $100,000 judgment against the District, Aguayo and others.

Discussion

The grounds for dismissal of a tenure teacher are set forth in C.R.S. 22-63-116. The grounds charged in this case are neglect of duty,

insubordination, immorality and other good and just cause.

I. Immorality

A. The term "immorality" is not defined in the statute. In Colorado, sexually provocative or exploitive conduct with minor female students has been held to be immoral. Weissman vs. Board of Education of Jefferson County School District No. R-1, 190 Colo. 414, 547 P.2d 1267 (1976) ("Weissman"); see Madril vs. School District No. 11, El Paso County, ___ Colo. App. _____, 710 P.2d 1 (1985). However, the term is not limited to sexually related conduct or involvement. Clarke vs. Board of Education of School District of Omaha, 215 Neb. 250, 338 N.W.2d 272 (1983) ("Clarke"); Palo Verde Unified School District of Riverside County vs. Hensey, 9 Cal.App.3d 967, 88

Cal.Rptr. 570 (1970) ("Palo Verde"); Bovino vs. Board of School Directors of the Indiana Area School District, 377 A.2d 1284 (Pa.Cmwlth. 1977) ("Bovino"). Immorality in a teaching context may include, for example, lying[13], theft[14], use of profanity[15] and racial slurs.[16]

While no definition of "immorality" can be precise or controlling, the term has often been defined in teacher discharge cases as conduct which offends the morals of the community and is a bad example to the youth whose ideals a teacher is supposed to foster and elevate. Clarke, supra; Balog vs. McKeesport Area School District, 484 A.2d 198 (Pa.Cmwlth. 1984); Bovino, supra. The term has also been defined as involving conduct hostile to the welfare of the general public, indecent, depraved

and demonstrating an inconsiderate attitude toward good order and the public welfare. Palo Verde, supra.

To constitute immorality under this statute it is necessary that conduct be related to a teacher's fitness to teach. To be grounds for discharge the conduct must indicate the teacher's unfitness to teach. Ricci v. Davis, ___ Colo. ___, 627 P.2d 1111 (1981); Weissman, supra.

B. Most of the 27 charges against Romero involve allegations of immorality. Several of these charges have not been established by the evidence. As to those facts which have been established, many do not constitute immorality. The throwing of the time clock or stopwatch (whether accidental or not); placing a foot on the head of a wrestler to demonstrate a move; throwing keys at a

wrestler who was "talking smart" to Romero telling the sweeper he would break his back; and accidentally breaking or aggravating the breakage of the mirrors (the Hearing Officer has found Romero did not lie about this activity), while possibly improper on other grounds, are not acts which the Hearing officer finds rise to the level of immorality as defined above.

Teasing wrestlers or making sexual comments about them in the manner established here does not involve immorality. It was not established by the evidence, nor is it clearly apparent or presumptive,[17] that such conduct is offensive to the morals of the community. Unsolicited counseling with a student about a possible pregnancy may be inappropriate in some ways, but again

does not rise to the level of immoral conduct.

Romero joked with Mindi A. about sexual matters and accused her of causing her boyfriend's wrestling loss of making him sexually frustrated. Sexual accusations against a minor female student have been afforded differing viewpoints by the courts. For example, in Bovino the court held that calling a 14-year-old girl a slut was an immoral act; in Thompson vs. Wake County Board of Education, _____ N.C. Appr. _____ , 230 S.E. 2d 164 (1976), rev'd on other grounds 292 N.C. 406, 233 S.E. 2d 538 (1977) the court held that calling a girl a whore was deplorable, but not immoral. On balance, Romero's conduct in this regard is not morally offensive or hostile to the welfare of the general

public nor was it sexually provocative or exploitive.[18] While this conduct is not to be condoned, it is not immoral.

The conduct of Romero regarding the Iowa/Fowler trip also does not constitute immorality. Romero did not advise the wrestlers of the precise nature of the trip before they left Denver, but his motivation in failing to do so was not proven. The evidence does not establish a fraudulent or dishonest intent in not disclosing this information.[19] The taking back of the singlets was a result of dissatisfaction with the wrestlers' performance under circumstances in which Romero was arguably justified in retaking the singlets. This conduct cannot be characterized as theft. Taking collateral for the bus ticket also does not rise to the level of immorality.

Peaceful contacts with witnesses, even if violative of instructions, can hardly be considered immoral. Threatening statements are disruptive to the system and disturbing to the recipients and are not to be condoned. However, there was no evidence that would place this conduct in the category of proven or presumptive immorality. The Hearing Officer also concludes that directing a student to use the whirlpool during class time, for non-medical purposes, does not constitute immorality.

Corporal punishment in the context of discipline in the freestyle wrestling program is not ~~immoral.~~ The contact involved was not shown to be physically or emotionally harmful (in fact, the evidence showed it to be lighthearted in many instances). The District itself

permits corporal punishment of students under controlled circumstances; thus, it cannot be said that such punishment per se offends the morals of the community or is hostile to the public welfare. Nothing in the way that such punishment was meted out results in this conduct constituting immorality.

C. Certain of Romero's conduct does, however, constitute immorality. Pulling Kevin L.'s hair to get him to admit to having sex and throwing Julian A. against a locker in the course of a discussion about returning to the wrestling team are unwarranted physical assaults. This conduct had nothing to do with discipline or, in the context of coaching, with instruction or encouragement.[20] Unprovoked, unjustified physical assaults on a member of the community, whether

students or not, constitute immoral conduct as defined in Section I,A of this discussion. Since students were involved, and the incidents were connected with a school program, the conduct clearly is related to fitness to teach and demonstrates unfitness. Weissman, supra; Ricci vs. Davis, supra.

Allowing students to use a sauna for artificial weight loss, in clear contravention of the interscholastic wrestling rules, also constitutes immorality. Romero was an aggressive disciplinarian who was able to keep his charges in line, yet he chose to bury his head in the sand: as long as he did not overtly direct a wrestler to use the sauna or see the wrestler doing so, Romero did not consider himself in violation of the rules. Yet, where he

chose to assert himself (for example, in matters of his wrestler's social lives or conduct) he was quite emphatic in expressing his views. His conduct with regard to the sauna conveyed a clear message to his wrestlers that if authority figures agree to look the other way, and if you don't get caught, it is acceptable to cheat. Such conduct clearly offends the morals of the community, is a bad example to the students, is hostile to the welfare of the general public and demonstrates an inconsiderate attitude toward good order and the public welfare. Also, since the conduct involves students and a school program, unfitness to teach has been established.

Telling wrestlers, when Julian A. quit the team, to "kick his butt" or to

"get him", or words to that effect, is also immoral conduct. Encouraging people, especially young students, to use violence to settle a disagreement certainly falls within the definitions of immorality set forth in this discussion. Again, unfitness to teach has been established since this conduct involved students in a school program.

Finally, threatening to turn in Robert W. for a drug offense if he did not wrestle is nothing less than blackmail. If Robert committed an offense which Romero should have reported, that was what Romero was required to do. If, as Romero asserts, there was nothing to report (since he did not see Robert use the drugs), then it was wrong to falsely threaten Robert. Either way, the use of the threat

constituted blackmail, clearly conduct which is considered morally offensive. The same type of conduct was involved in threatening to hold up Tim N.'s graduation if he did not pay for wrestling stickers, even though those funds did not involve a school activity. As defined above, the Hearing Officer finds this conduct to be immoral. Again, since the conduct involves a student in a school program or the question of graduation, unfitness to teach has been shown.

II. Insubordination

A. Insubordination, as used in this statute, has been defined differently by two panels of the Colorado Court of Appeals. In Thompson vs. Board of Education of Roaring Fork School District, _____ Colo. App. _____

____, 668 P. 2d 954 (1983) (hereafter "Thompson") the term was defined as "a constant or continuing intentional refusal to obey a direct or implied order, reasonable in nature, and given by and with proper authority". 668 P. 2d at 956. In Ware vs. Morgan County School District RE-3, No. 84CA0482 (Colorado Court of Appeals, December 16, 1985), 15 The Colorado Lawyer 286 (hereafter "Ware"), a different panel expressly chose not to limit the definition of insubordination as in Thompson. Rather, that panel defined the term as "a wilful failure or refusal to obey reasonable orders of a superior who is entitled to give such orders".

The Hearing Officer adopts the definition in Ware as being the appropriate statement of the law.

Circumstances may exist where a single act of disobedience would commonly be considered insubordinate. No need appears to restrict the term exclusively to some continuous course of conduct.

B. Seventeen of the charges relate to insubordination. The factual basis of some of these charges has not been established. Other conduct, although established, did not amount to insubordination.

The District proved four express orders of superiors on which a claim of insubordination may be based. These orders were: (1) Moser's order not to contact Kevin L. or Mindi A.; (2) Aguayo's written directive on January 31, 1986 not to interfere with the investigation of the allegations against Romero and not to contact teachers,

students, staff or administrators; (3) the District's policies on corporal punishment; and (4) the interscholastic wrestling rules. All of these orders were reasonable and were given by superiors entitled to do so.

Several of the alleged acts of insubordination were not proven[21] or did not relate to the above express orders.[22] Further, there is no evidence that some clearly implied order prohibited Romero from contacting wrestlers who left the team, prohibited him from sending a wrestler to the whirlpool on class time or prohibited him from causing friction among the staff (to imply such orders there would have to be evidence of the policies, directives or orders from which such orders are implied. There was no such evidence).

C. Allowing students to use an artificial weight loss device (the sauna), and implicitly condoning that activity, constituted a violation of the directive prohibiting use of such devices. This conduct by Romero was insubordinate.

D. The District's rules against corporal punishment were clearly violated in the incidents regarding pulling Kevin L.'s hair and throwing Julian A. against a locker. None of the limitations on the use of corporal punishment (request or permission of a parent or guardian, thorough investigation, presence of a second school official or teacher, etc.) were utilized in these two cases.[23] Romero's placing his foot on Robert W.'s head was an act taken for instructional purposes, to demonstrate a wrestling

move, and was not punishment for Robert's failure to execute the move.[24] As such, it was not a disciplinary act and did not violate the corporal punishment rules.

Finally, as to corporal punishment,[25] the discipline of freestyle wrestlers must be considered. The District's corporal punishment policies did not apply to the Lightning Bolt Club, which was an activity having no connection with the District. Thus, even if the discipline imposed on club members violated these district policies, the policies did not apply to this activity and no act of insubordination occurred.

The Hearing Officer has found that Romero's only contact with Kevin L. or Mindi A. after Moser's order to cease contact with those students came on

January 29 1986, when Romero asked Kevin why Kevin had done "all this" to him. While that contact is technically a violation of Moser's order, it would be noted that the original order related to Romero's harassment of the students regarding Kevin's involvement in wrestling, his activities with Mindi or Mindi's supposed pregnancy. Prior to January 29, 1986, when Romero had not contacted either student for over two months. The January contact was brief and related only to the investigation and charges, a new matter which Romero might not have associated with Moser's order. While this contact was technically a violation of the order, the Hearing Officer does not find it to be a willful or substantial -- it is at best de minimus.

The contact with Mindi A.'s father on February 5, 1986, on the other hand, was a clear violation of Aguayo's January 31 order not to interfere with the investigation and not to contact teachers. This act was insubordinate. All of the other proven contacts with staff or students occurred prior to Aguayo's January 31 order.[26]

III. Neglect of Duty

A. The Colorado Supreme Court has broadly described the duty of a teacher under this statute as being to act as required by one's occupation. Benke vs. Neenan, _____ Colo. _____, 658 P.2d 860 (1983). To find neglect of duty it should appear that a reasonable person, under the same circumstances, would have recognized the duty and the obligation to conform to it.

Overton vs. Goldsboro City Board of Education, _____ N.C. _____, 283 S.E. 2d 495 (1981).

B. With the exception of the charges alleging threats to staff, all of the conduct of which Romero is accused is brought under the neglect of duty clause.[27] As to the conduct proven by the evidence, certain actions do not constitute neglect of duty. Attempts to convince wrestlers to return to the team are not violations of a duty (the Hearing Officer has found that Romero's conduct was not responsible for Julian A. leaving school). Throwing the time clock in Alex B.'s direction, under the circumstances, was not shown to be an improper way to motivate an athlete (even if the conduct was offensive to that student). While it was inappropriate to volunteer to counsel

Mindi and Kevin about her possible pregnancy, that conduct was not shown to violate any duty of a teacher, in the sense that it would be clear to a reasonable person that this conduct is prohibited.

Arguing with Tim N. about the sale of stickers in front of the football team again may illustrate a lack of tact, but is not neglect of duty. Nor is it clear, in the context of a coach-athlete relationship on the high school level, that teasing about sex along with the students is unreasonable. That conduct is not considered to be neglect of duty. Finally, the evidence did not establish that Romero deliberately destroyed District property or lied about doing so.

C. Discussing wrestling or their personal problems with Mindi and Kevin,

in and of itself, is not a neglect of duty. However, it should be recognized by a reasonable teacher that such discussions should not occur on class time. A teacher who is not involved in a student's current educational activity clearly should know better than to remove a student from class to discuss athletic participation or personal matters. The same is true for sending Kevin to a whirlpool during class time to treat his knee so that he could wrestle that day.[28] All of this conduct constitutes neglect of duty.

It should be equally clear that a teacher has a duty not to assault students for non-disciplinary reasons or in violation of the District's corporal punishment policies. The assaults on Kevin L. and Julian A. are neglect of

duty. The contact with Robert W. in demonstrating a wrestling move was appropriate (see Section II, C of the Discussion). However, throwing keys at Robert is considered to be neglect of duty; even in an angry moment with a difficult student, it is reasonable to expect a teacher not to throw objects at a student.

Romero also had a duty to take reasonable steps to prohibit his students from using illegal devices for weight loss. While it is true that he cannot guarantee whether the wrestlers will heed his admonition, his conduct in this case amounted to tacit approval. Romero had sufficient authority and command over his wrestlers than an order not to use the sauna would likely have been obeyed. His

duty was to clearly state his disapproval, not to look the other way.

A teacher also has a duty not to unduly embarrass his students. Statements to a 15 year old girl, in front of others, about her physical relationship with a boy are improper, even if made as a joke. It should be clear to a teacher that a student has a right to be free from such treatment. Similarly, Tim N. had a right to expect that his athletic failures not be paraded in front of the student body. Even if the coach could rightly criticize his effort, there is no need to do so in public. Causing embarrassment to these students in this fashion should be recognized but a reasonable teacher as conduct to be avoided and Romero is guilty of neglect of duty in this regard.

Blackmail of students, threatening a student with adverse consequence to gain some goal of the teacher, clearly must be considered neglect of duty. That such conduct does not constitute reasonable interaction between student and teacher is clear. Romero is guilty of such a neglect of duty in two cases; threatening to report Robert W. for drug violations unless Robert returned to the wrestling team; and threatening to hold up Tim N.'s graduation if he failed to pay for wrestling stickers from a non-school activity.

Corporal punishment in the freestyle wrestling program was not associated with a Manual program. Nevertheless, 90% of the Lightning Bolt Club membership were Manual wrestlers. A teacher is a role model. It is his duty to instill

appropriate values in his students. As the court stated in Board of Education of Argo-Summit School District No. 104, Cook County vs. Hunt, 138 Ill. App. 3d 947, 487 N.E. 2d 24, 27 (1985):

> "[T]eachers occupy a special position of trust in our society. As leaders and role models, it is the teacher's responsibility to instill basic societal values and qualities of good citizenship in the students."

Romero did not attempt to use discipline short of corporal punishment to teach values regarding responsibility as a member of a group. Rather, he reinforced in his students the concept of violence as a primary tool of discipline or control. Even though some of these

wrestlers generally behaved poorly or were members of street gangs, Romero's approach was consistent with their view of society, not with the healthier view he was responsible to instill. Corporal punishment may well have been necessary in the Lightning Bolt Club, but as a first resort it failed in the general goal of a teacher (reflected also in the District's policies) to teach responsible behavior.

The Lightning Bolt club was not a District activity. Nevertheless, its members were primarily Romero's Manual wrestlers and the activity was identical to a school activity: wrestling. Romero was the student's coach in school or in the club. As such, his responsibility as a role model and guide did not end with the school year. Allowing corporal

punishment in the club program constituted a neglect of duty as a District teacher.

The responsibility to teach appropriate behavior also creates a duty to not encourage excessive or violent behavior. In telling the wrestlers to "get" Julian A. for quitting the team, or to "kick is butt", Romero was guilty of a neglect of that duty.

While the Iowa/Fowler trip was not a District activity, it was closely related to Manual (as described above). Romero's responsibility was to accurately advise the wrestlers of the nature of the trip. Even if he did not intentionally mislead the students, he failed to accurately describe the outing. Further, he was a chaperone to a group of minors. His status as a legitimate chaperone came

from his role as teachers and coach. Parents had a right to expect that their sons would not be left unsupervised. In failing to accurately advise the students of the nature of this trip, and in failing to make arrangements to continue supervision of his wrestlers, Romero was guilty of a neglect of duty.

IV. Other Good and Just Cause

A. Every act charged is alleged by the District to constitute other good and just cause for dismissal. A review of all the proven conduct must thus be undertaken in light of this standard.

Several courts have defined the phrase "other good and just cause" or similar terms. This phrase includes any cause bearing a reasonable relationship to a teacher's fitness to discharge his duties [Spurlock vs. Board of Trustees,

Carbon County School District No. 1, ___ _____ Wyo. _____, 699 P. 2d 270 (1985) (good cause); Welch vs. Board of Education of Chandler Unified School District No. 80 of Maricopa County, 136 Ariz. 552, 667, P. 2d 746 (Ariz. App. 1983) (good cause); Board of Education of Tempe Union High School District of Maricopa County vs. Lammle, 122 Ariz. 522, 667 P. 2d 48 Ariz. App. 1979 (good cause); Ellenburg vs. Hartselle City Board of Education, _____ Ala. Civ. App. _____, 349 So. 2d 605 (1977) (other good and just cause)]. The term has also been defined to include conduct which materially and substantially affects performance [Mott vs. Endicott School District No. 308, Wash. 2d _____, 713 P. 2d 98 (1986) (sufficient cause)] or which in

some reasonable sense is detrimental to students (Welch vs. Board of Education of Chandler Unified School District No. 80 of Maricopa County, supra; Board of Education of Tempe Union High School District of Maricopa County vs. Lammle, Supra). Additional formulations of "just cause" or "sufficient cause" include conduct so clearly unacceptable as to warrant discharge (see Mott vs. Endicott School District No. 308, supra) , substantial shortcomings which render continued employment in some way detrimental to discipline and effective service [Chicago Board of Education vs. Payne, 102 Ill. App. 3d 741, 430 N.E. 2d 310 (1981)] or conduct which significantly and adversely affects performance, efficiency or high quality education [Wedergren vs. Board of

Directors, _____ Ia. _____, 307 N.W. 2d 12 (1981); Simmons vs. Vancouver School District No. 37, 41 Wash. App. 365, 704 P. 2d 648 (1985)].

In sum, other good and just cause consists of conduct of some significant or substantial nature which materially affects the performance or efficiency of a teacher or which is detrimental to the educational process. A reasonable relationship must exist between the conduct and the teacher's fitness to teach or discharge his duties. Spurlock vs. Board of Trustees, Carbon County School District No. 1, supra; Wedergren vs. Board of Directors, supra; Board of Education of Tempe Union High School District of Maricopa County vs. Lammle, supra; Welch vs. Board of Education of Chandler Unified School district No. 80

of Maricopa County, supra; Chicago Board of Education vs. Payne, supra; Ellenburg vs. Hartselle City Board of Education, supra; see Weissman.

B. Discussions with Mindi A. or Kevin L. about the consequences of Mindi's possible pregnancy or about Kevin's return to wrestling in and of themselves are not significant acts which materially affect Romero's performance or are detrimental to the educational process. Romero's conduct did not cause Mindi to leave school. Attempts to convince wrestlers to return to the team, even though aggressive, also do not meet the definition of good and just cause (Romero's efforts were not the cause of Julian A.'s leaving school).

The use of profanity or the teasing with male students regarding sexual

matters, in the coach-athlete context, may be inappropriate. However, the evidence does not establish that this conduct is significant, that it affects Romero's performance, that it is detrimental to the educational process or that it is reasonably related to his fitness to teach or to discharge his duties. The same can be said regarding the argument with Tim N. in front of the football team. In the context of an athletic coach, the same analysis applies to the incident of the time clock and Alex B.

The contacts with Kevin L., Tim N. and Mindi A.'s father which were alleged to constitute interference with the investigation do not constitute other good and just cause. Under the circumstances, attempts by Romero to

determine the nature of the investigation against him and to contact witnesses or others involved were understandable and not significant conduct affecting his fitness to teach or to discharge his duties.

C. Other conduct established by the evidence does amount to good and just cause for action by the District. The physical assaults on Kevin L. and Julian A. are clearly significant actions affecting performance of a teacher and are clearly significant actions affecting performance of a teacher and are detrimental to the educational process. Similarly, removing students from class for the purpose of discussing personal problems and wrestling or for non-essential treatment of a wrestling injury constitutes such good and just cause.

Using the photograph and caption regarding Tim N. as he did, Romero tried to motivate Tim by humiliating him before his school-mates. Romero also embarrassed or humiliated Mindi A. regarding her physical relationship with Kevin L. Both of these incidents constitute good and just cause as defined above.

For these reasons discussed under Section III, C, Romero's use of corporal punishment with the Lightning Bolt Club and his failure to accurately describe the Iowa trip and to properly chaperone his charges on that trip constitute conduct which is detrimental to the educational process, which materially affects his performance as a teacher and which is reasonably related to his fitness to teach. The same conclusion is

reached regarding the tacit approval of illegal weight loss and the attempts to blackmail Robert W. (regarding his alleged possession of drugs) and Tim N. (concerning the sale of wrestling stickers). All of this conduct fits the parameters of other good and just cause.

Romero on many occasions used threatening language with students, teachers and staff.[29] None of these remarks constituted a serious threat; some were made in the heat of anger or frustration. Nonetheless, the threats reasonably appeared serious to the recipients. Such statements create a poor atmosphere among students and teachers, interfere with the educational process and create dissension in the school community. In addition, this conduct along with the throwing of keys

at Robert W.) reflects a lack of self-restraint and that in dealing with co-workers and pupils. Such conduct has been held to be sufficient cause for discipline of a teacher. [Rabon vs. Bryan County Board of Eduction, 173 Ga. App. 507, 326 S.E. 2d 577 (1985); Ellenburg vs. Hartselle City Board of Education, supra; Griggs vs. Board of Trustees of Merced Union High School District, 37 Cal. Rptr. 194, 389 P. 2d 722 (1964)] and amounts to other good and just cause under Colorado law.

RECOMMENDATION

After hearing the District's Board of Education may dismiss or retain a teacher or place him on one year's probation. C.R.S. 22-63-117(10). The Hearing Officer however, is limited to

one of two recommendations: dismissal or retention. C.R.S. 22-63-117(8).

This case involves instances of physical abuse of students, violation of interscholastic wrestling rules, humiliation of students, disruption to the school community, blackmail of students, promoting negative rather than positive social conduct and other causes for discipline. It is difficult to consider this catalogue of misconduct and recommend any action other than dismissal.

In making this recommendation the Hearing officer has considered that as of January 28, 1986 Manual's administrators were cognizant of some fairly serious misconduct (see footnote 7) which they did not consider grounds for discipline.

Still, the cumulative effect of all the proven conduct cannot be ignored.

The Hearing Officer has also considered Romero's assertion that he is the subject of a vendetta by Dr. Aguayo. The District's treatment of this case in January, 1986 does not reflect an attempt to conduct a thorough, fair investigation. The process was, in reality, spearheaded by Dr. Aguayo, not by the building principal (which would be the normal approach). The investigation took only two days, absent any contact or input from Romero, and Romero's discharge was almost a foregone conclusion. Nevertheless, he has had his day in court in this hearing and the cumulative nature of the offenses warrants dismissal, regardless of what Dr. Aguayo's motives may have been.

Romero's conduct known prior to January 28, 1986 warranted no more than a discussion with the teacher in the minds of Manual's administrators. In January, no consideration was given to warnings or to remediation of Romero's deficiencies. Romero is a competent, dedicated coach who is motivated by a desire for excellence, who demands excellence from his charges and who is concerned with his wrestlers. In most cases, the Hearing Officer believes Romero's motives regarding his students were proper; unfortunately, his methods tended to be aggressive and heavy-handed. Considering these mitigating factors, the District's Board of Education may want to consider whether the option of a one year probation is appropriate. The Hearing Officer, however, has not such option.

On balance, considering the nature of his conduct, the Hearing Officer recommends that Romero be dismissed.

Dated: May 21, 1986

_____

Marshall A. Snider
Hearing Officer

FOOTNOTES

1. The parties waived the requirement of C.R.S. 22-63-117(5) that the hearing commence within 30 days after selection of the Hearing Officer. By order dated March 14, 1986 the Hearing Officer found good cause for not commencing the hearing by the statutory deadline.

2. This hearing was open to the public and the pleadings, containing the names of the students involved, are public record. Nevertheless, this case involves sensitive matters as to some students. The record reveals that this matter has received some media attention and the Hearing Officer therefore chooses to not identify students by last name in the Findings of Fact. There will be no confusion to the parties as to the identity of any student and, in any event, the Hearing Officer has prepared and placed in the file a key coorelating the students' names with the designations used in these findings.

3. Mindi's parents are divorced and at the relevant time she did not live with her father.

4. The pertinent rule provided that "The use of sweat boxes, hot showers, whirlpools or similar artificial heating devices...for weight reduction purposes is prohibited".

5. Romero contacted Kevin only twice after November 18. Moser was advised of the first of the contacts but took no disciplinary or other action regarding it.

6. The usual process for considering complaints against an athletic coach is to go through the building principal.

7. These matters were those discussed at the November 15, 1985 meeting (Findings of Fact, paragraph 16), the Jimmy G. incident (paragraphs 19 and 20) and the threat to Delores Payne (paragraph 65).

8. About 90% of the club members are wrestlers at Manual.

9. The wrestlers were to sell bumper stickers to help defray the cost, but the testimony was in dispute as to whether Romero told the wrestlers about the sale of stickers before or after they left on the trip.

10. There was no evidence that Romero harrassed or ridiculed Kevin regarding this injury.

11. There was evidence that Romero required wrestlers to compete in weight classes above their actual weight, but doing so did not violate any rules of interscholastic wrestling.

12. The evening of January 28 Romero called Moser to ask about the investigation. Moser refused to identify the parents who had complained and told Romero he could say nothing further. When Romero asked to meet with Moser and Aguayo, Moser referred him to Aguayo.

13. Appeal of Batrus, 148 Pa. Super. 587, 26 A.2d 121 (1942); Balog vs. McKeesport Area School District, 484 A.2d 198 (Pa. Cmwlth. 1984); Goldin vs. Board of Education of Central School District No. 1, 78 Misc.2d 972, 359 N.Y.S.2d 384 (1973).

14. Kimble vs. Worth County R-III Board of Education, ___ Mo.App. ___, 669 S.W.2d 949 (1984).

15. Bovino vs. Board of School Directors of the Indiana Area School District, 377 A.2d 1284 (Pa. Cmwlth. 1977).

16. Clarke vs. Board of Education of School District of Omaha, 215 Neb. 250, 338 N.W.2d 272 (1983).

17. See Weissman vs. Board of Education of Jefferson County School District No. R-1, 190 Colo. 414, 547 P.2d 1267, 1273 (1976) (hereafter "Weissman").

18. Weissman, supra; Madril vs. School District No. 11, El Paso County, _____ Colo. App. _____, 710 P. 2d 1 (1985).

19. The District's burden of proof in this case was by a preponderance of the evidence. Madril vs. School District No. 11, El Paso County, supra.

20. See Hogenson vs. Williams, ___ Tex. Civ. App. ___, 542 S.W. 2d 456 (1976).

21. These acts involved the alleged assault on Jeff H., deliberate destruction of school property and lying about the broken mirrors.

22. See footnote 21. Also, there was no order regarding contact with wrestlers who quit the team.

23. The same may be said with regard to the throwing of keys at Robert W. However, that incident appeared to occur as a result of a momentary loss of control, for which Romero apologized, and which caused no harm. While technically a violation of the corporal punishment rules, the incident is de minimus.

24. See Hogenson vs. Williams, supra at 460.

25. The throwing of the time clock at Alex B. was charged as insubordination. However, the clock was not school property. Also, it was not thrown with the intent or result of causing physical injury. Thus, no act of corporal punishment is involved.

26. The District argues that an "implied" order existed not to contact witnesses. The Hearing Officer disagrees; it cannot be logically or clearly implied that a teacher being investigated cannot speak to witnesses or others involved in the process.

27. The District has argued that interference with the investigation constitutes neglect of duty. However, the District did not disclose in the specifications that such conduct would be so charged.

28. There was no evidence that the students who accompanied Kevin also missed classes.

29. These threats include those to Jimmy G., statements regarding Hoops' family, the statements to Payne and to Mindi A.

(communicated through her father) and the instruction to wrestlers to "get" Julian A.

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1985. Conspiracy to interfere with civil rights

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws. . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

§ 22-63-117. Dismissal - procedure - judicial review.

(8) A record and transcript shall be made of all evidence and testimony received by the administrative law judge. The administrative law judge shall review the evidence and testimony and make written findings of fact thereon. The administrative law judge shall make one of the two following recommendations: The teacher be dismissed or the teacher be retained. The findings of fact and recommendations shall be adopted by the administrative law judge in open session not later than thirty days after the conclusion of the hearing. The administrative law judge shall forthwith forward to said teacher and to the secretary of the employing board a copy of the findings of fact and copy of the recommendations. The costs for the recording of evidence shall be paid by the school district.

(10) The board of education shall review the administrative law judge's findings of fact and recommendations, and it shall enter its written order within thirty days after the date of the administrative law judge's findings and recommendations. The board shall take one of the three following actions: The teacher be dismissed; the teacher be retained; or the teacher be placed on a one-year probation; but the board shall make a conclusion, giving its reasons therefor, that the administrative law judge's findings of fact are not supported by the record made before the

administrative law judge if it dismisses the teacher over the administrative law judge's recommendation of retention, and such finding shall be included in its written order. The secretary of the board of education shall cause a copy of said order to be given immediately to the teacher and a copy to be entered into the teacher's local file. If one or more of the deadlines for holding a hearing, for adoption of findings and recommendations by the administrative law judge, or for the board's written order cannot be met for good cause shown and the procedures required by this section are followed except for compliance with any such deadline, the proceedings under this section shall not be invalidated.

(2)

No. 91-601

In The

Supreme Court of the United States

October Term, 1991

EDWARD J. ROMERO,

Petitioner,

v.

ALBERT AGUAYO, DONALD MOSER, JAMES SCAMMAN, and SCHOOL DISTRICT NO. 1, CITY AND COUNTY OF DENVER,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals follow established precedent and correctly hold that the findings of an impartial administrative hearing officer which were binding on the Board of Education broke the chain of causation between alleged retaliatory motivation of an individual defendant who was involved in the initial investigation and the Board's decision to terminate Petitioner?

2. Did the Court of Appeals follow established precedent and correctly hold that Petitioner was unable to demonstrate the Board of Education's decision to terminate him was influenced by anyone or anything except the impartial hearing officer's report?

3. Did the Board of Education follow established precedent and correctly hold that Petitioner was terminated because of his repeated misconduct while employed by the School District?

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CONSTITUTIONAL AND STATUTORY PROVISIONS

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STATEMENT OF THE FACTS

Petitioner's Statement of Facts simply ignores and omits the uncontradicted findings of fact that chronicled the teacher's misdeeds and required his termination. More significantly, he omitted the most damning conclusions of the Hearing Officer.

On page 9 of the Petition for Certiorari, Petitioner gave a deliberately incomplete quotation of some conclusions and recommendation of the Hearing Officer. The

paragraph in the Hearing Officer's Findings and Conclusion that led up to the quoted section is the most telling condemnation of the teacher's actions and summarizes the catalogue of gross misconduct by the Petitioner which was the cause of his dismissal from the School District.

> This case involves instances of physical abuse of students, violation of interscholastic wrestling rules, humiliation of students, disruption to the school community, blackmail of students, promoting negative rather than positive social conduct and other causes for discipline. It is difficult to consider this catalogue of misconduct and recommend any action other than dismissal.

(A-118)

The Hearing Officer made those findings and reached that conclusion after a full adversary hearing under the Colorado Teacher Employment, Dismissal and Tenure Act, C.R.S. § 22-63-101, *et seq.* (the "Tenure Act").[1]

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[1] Under the Tenure Act provisions in effect at the time relevant to this lawsuit, the process for dismissal of a tenured teacher commences with the filing of charges for dismissal with the board of education "by the chief executive officer of the district or any member of the board." *C.R.S. § 22-63-117(2).* The statutory grounds for dismissal include, *inter alia*, incompetency, neglect of duty, immorality, and other good and just cause. *C.R.S. § 22-63-116.* The board must then decide whether to accept the charges for review. *C.R.S. § 22-63-117(2).* If the board accepts the charges, the teacher is so notified. *C.R.S. § 22-63-117(3).* The teacher may request a hearing on the charges. *C.R.S. § 22-63-117(3).*

(Continued on following page)

It was those very misdeeds which led numerous students and parents to approach Dr. Albert Aguayo, Assistant Superintendent for Secondary Education, in January 1986 with complaints about Petitioner's abuse of students, violation of rules, and other misdeeds, in his role as a teacher and wrestling coach at Manual High School. The parents and students approached the Assistant Superintendent because some of these same parents and students were dissatisfied with the results of a prior contact with the high school administration regarding this same teacher. Donald Moser, Manual High School

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(Continued from previous page)

Hearings are conducted by the Division of Administrative Hearings, an agency of Colorado state government. *C.R.S. § 22-63-117(5).* A neutral hearing officer is selected from a list of three available. The district and the teacher each strike one name; the remaining hearing officer hears the case. *C.R.S. § 22-63-117(5).* The Division of Administrative Hearings Rules incorporate the full range of discovery procedures available under the Colorado Rules of Civil Procedure. *Rule 8, 1 C.C.R. 104-1.*

The hearing officer conducts a full-scale adversarial, on-the-record hearing. *C.R.S. § 22-63-117(7)(8).* The hearing officer makes findings of evidentiary fact, ultimate fact, and a recommendation to the board that the teacher be dismissed or retained. *C.R.S. § 22-63-117(8).* The hearing officer's findings of evidentiary fact are binding on the board. *Blaine v. Moffat County School Dist. RE-1,* 748 P.2d 1280, 1288 (Colo. 1988). The board may make its own findings of ultimate fact (i.e., whether the historical facts establish one of the statutory grounds for dismissal) and may impose a different sanction, but those determinations must be well grounded in the hearing officer's findings of evidentiary fact. *Id.* The board's decision is subject to review in the Colorado Court of Appeals. *C.R.S. § 22-63-117(11).*

Principal, was instructed to initiate an investigation into the complaints. He was assisted by Assistant Principal Dr. Farrell Howell and Mr. Lou Lopez of the School District's security office.

On February 14, 1986, based on statements that were handwritten and signed by students and parents and obtained during the investigation, Defendant Dr. James Scamman, School District Superintendent, referred charges to the Board of Education for the dismissal of the Petitioner pursuant to the applicable provisions of the Tenure Act, C.R.S. § 22-63-117(2). The filing of those charges by the Superintendent initiated the statutory procedures. The charges alleged that Mr. Romero had engaged in conduct establishing the following statutory grounds for dismissal under the Tenure Act: insubordination, neglect of duty, immorality, and other good and just cause for dismissal. C.R.S. § 22-63-116. On February 20, 1986, the District's Board of Education accepted the charges for review.

Pursuant to the terms of the Tenure Act, a hearing was held before Hearing Officer (now, Administrative Law Judge) Marshall A. Snider of the Division of Hearing Officers of the Department of Administration of the State of Colorado. (See, Findings of Fact and Recommendation, hereinafter A37-121). Petitioner appeared through counsel and vigorously contested the District's case. He engaged in substantial pre-hearing discovery, including the deposition of at least seven District witnesses. In addition, the Petitioner presented a thorough defense to the charges against him. At least 26 witnesses testified at the hearing for the District and a dozen more testified for the Petitioner.

Subsequent to the hearing, the Hearing Officer made lengthy findings of fact and recommendations. (A37-121) The district court concluded that the factual findings were not subject to relitigation in the federal court.[2] Significantly, Petitioner disputes none of these factual findings. Hearing Officer Snider found Petitioner engaged in various acts of misconduct amounting to immorality within the meaning of the Tenure Act. (A87). Such conduct included pulling one student's hair to get him to admit to having sex and slamming another student against a locker (Findings, A87); instructing student wrestlers to use a sauna for artificial weight loss and to lie about their ages in open contravention of interscholastic wrestling rules (A88-89); encouraging students to use violence against other students (A89-90); blackmailing students by threatening to turn a student in for a drug offense if he did not wrestle (A90-91); and threatening to hold up another student's graduation if he did not pay for wrestling stickers (A91); threatening one student by telling him he would break his "goddamn back." (A91). He knowingly allowed physical abuse of students by other students in his home. (A55).

The Hearing Officer found Petitioner had engaged in misconduct amounting to insubordination within the meaning of the Tenure Act. (A95) Such insubordination included Petitioner's willful violation of the District's policies against corporal punishment by striking and

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[2] The trial court entered this ruling orally. It was then incorporated into the Amended Stipulated Pre-Trial Order. (App. 4)

pulling the hair of students (A95); violation of interscholastic wrestling rules (A95), and violating orders of the Principal and Assistant Superintendent not to interfere with the investigation of the pending charges. (A93; 98)

The Hearing Officer ruled the following misconduct of Petitioner amounted to neglect of duty within the meaning of the Tenure Act: assaults on students discussed in connection with the immorality charge, *supra* (A101); throwing keys at a student (A102); condoning use of illegal devices for weight loss (A102); embarrassing a 15-year old female student by making statements in front of others about her physical relationship with a boy (A103); blackmailing students as referenced, *supra* (A104); knowingly allowing physical abuse of students by other students in his home in connection with an outside wrestling program (A106); telling wrestlers to "get" a student for quitting the team or to "kick his butt." (A107)

The Hearing Officer concluded the misconduct discussed above, in connection with the other charges, in addition to his "use of threatening language with students, teachers, and staff," (A116) constituted other good and just cause for dismissal within the meaning of the Tenure Act. (A116-117) Specifically, the Hearing Officer concluded that the misconduct had a direct and adverse impact on the Petitioner's ability to serve as a teacher in the District. (Findings, p. 21). The Hearing Officer concluded: "It is difficult to consider this catalogue of misconduct and recommend any action other than dismissal." (A118)

Petitioner's claims of improper motives by Dr. Aguayo and retaliation for alleged exercise of free speech on behalf of minorities were raised and evidence was presented on those claims at the hearing.[3] As noted above, the quotation of the Hearing Officer's conclusions on page 9 of the Petition inexcusably and deliberately omits the two conclusions on this matter. The first is: "Still, the cumulative effect of all of the proven conduct cannot be ignored." (A119) On that same page, the Hearing Officer, more significantly, concluded:

> Nevertheless, he (Romero) has had his day in court in this hearing, and the cumulative nature of the offenses warrants dismissal, regardless of what Dr. Aguayo's motives may have been. (A119)

He recommended to the Board of Education that the teacher be dismissed from his employment as a tenure teacher with the District. (A121)

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[3] Defendants also argued an alternative theory for summary judgment which was not ruled on by the Tenth Circuit. Under *University of Tennessee v. Elliot*, 478 U.S. 788, 106 S.Ct. 3220 (1986), Petitioner's federal claims should have been dismissed since federal courts in § 1983 or § 1985 cases must give the same preclusive effect to issues or claims already determined in a state administrative proceeding that state courts would give them. The Colorado Supreme Court in *Umberfield v. School District No. 11*, 522 P.2d 730, 733 (Colo. 1974) held that the Tenure Act proceedings give a tenure teacher an opportunity to raise all defenses including constitutional defenses, and the same claims were litigated and resolved in the Tenure Act proceedings in this case. Principles of claims and issue preclusion have been applied to administrative proceedings by the Colorado courts. *Industrial Commission v. Moffatt County School District*, 732 P.2d 616, 620 (Colo. 1987).

On June 19, 1986, the Board of Education adopted the Hearing Officer's Findings of Fact and Recommendation and dismissed Petitioner. Although Petitioner had a right under the Tenure Act to appeal his dismissal to the Colorado appellate courts, C.R.S. § 22-63-117(11), he did not.[4] He then filed this case in the United States District Court.

As a part of the pre-trial order in the district court, the parties entered into the following factual stipulations:

> D. On June 19, 1986, Plaintiff was discharged for cause by the Board of Education of the Defendant School District.
>
> E. Plaintiff could only be discharged for statutorily specified cause.
>
> * * *
>
> G. Plaintiff was afforded a hearing as provided by the Teacher Tenure Act, at which he was represented by counsel. Pursuant to C.R.S. § 22-63-117, Hearing Officer Snider made findings that certain of the statutory grounds for dismissal had been proved and recommended Plaintiff's termination.
>
> H. Relying **solely** on Mr. Snider's finding and recommendation, the Board of Education voted to dismiss Plaintiff. *(Emphasis added).*

(App. 5, 6)

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[4] In oral argument before the United States Court of Appeals for the Tenth Circuit, counsel for Petitioner admitted that if he had filed an appeal in the Colorado Court of Appeals, the termination would have been sustained under the standards of Colorado law.

Based in part on these stipulations and Petitioner's answers to interrogatories and deposition testimony, the Defendants filed their motion for summary judgment. In granting summary judgment, the district court held:

> Plaintiff has conceded the fairness of the administrative hearing and the evidentiary support for the factual findings made by the Hearing Officer. . . . What (the findings of the Hearing Officer) did, however, is break the chain of causation between any retaliatory motivation by the individual defendants and their investigative and prosecutive roles and the discharge decision.
>
> There is nothing to suggest that the evidence relied upon by the Hearing Officer in making his findings was fabricated or tainted by the conduct of the individual defendants.
>
> * * *
>
> Additionally, the deposition testimony of four Board members was that each of them made a decision based solely on the record before the Hearing Officer. (A26, 27, 34)

While the district court determined that the Petitioner did produce enough evidence to support a finding that Dr. Aguayo was motivated by Petitioner's constitutionally protected conduct in causing the investigation of him that did not follow normal procedure, it concluded:

> The Plaintiff has failed to present evidence to support a finding that Aguayo's actions caused the plaintiff's discharge. The plaintiff's own evidence shows that he lost his job because the facts found by the Hearing Officer after a fair hearing established statutory grounds for his

> dismissal and that the Board's decision was a valid exercise of discretion. (A35)

He also determined that there was insufficient evidence to support the Section 1985(2) conspiracy claim. (A34)

In affirming the summary judgment, the United States Court of Appeals for the Tenth Circuit held:

> The hearing officer concluded, however, that Romero's conduct, including physical abuse, blackmail, and humiliation of students, justified his termination. (A6)
>
> * * *
>
> Based on a review of the record, we conclude the district court properly found Romero presented no evidence indicating his exercise of protected rights played a motivating part in the Board of Education's decision to terminate him. Romero was discharged according to the statutory procedure based on the officer's recommendations. Romero admits there is evidentiary support for the officer's factual findings concerning Romero's misconduct. The district court properly concluded his findings "break the chain of causation between any retaliatory motive by the individual defendants and their investigative and prosecutive roles and the discharge decision."
>
> Romero was unable to demonstrate the board of education's decision to terminate him was influenced by anyone or anything except the officer's report. He presented no material evidence supporting his allegations concerning improprieties in the Board's handling of this case. Romero was terminated because of his repeated misconduct while employed by the School District. The

defendants' retaliatory motivations, if they did exist, were not a motivating factor in this decision. Romero also failed to present any evidence supporting his conspiracy claim under Section 1985(2). (A10-12)

SUMMARY OF ARGUMENT

The Supreme Court fully analyzed the issue of causation and the appropriate causation test to apply in mixed motive cases in *Mt. Healthy School District v. Doyle*, 429 U.S. 274, 97 S.Ct. 568 (1977). The Petitioner stipulated in the trial court that the Board of Education relied solely on the Hearing Officer's findings and recommendation when it voted to dismiss the Petitioner. The District Court and Court of Appeals correctly applied the *Mt. Healthy* causation analysis in concluding the Hearing Officer's findings broke the chain of causation between the Board's act of terminating Petitioner and any improper motive by any individual defendant. The Tenth Circuit decision follows established precedent and does not conflict with any other case.

ARGUMENT

REASONS FOR DENYING THE WRIT

A. This Court's *Mt. Healthy* causation analysis was correctly applied by the courts below since the Board of Education was motivated solely by the Hearing Officer's findings of fact and recommendation for dismissal.

The trial court concluded that although the evidence suggested that procedures followed in the investigation were not the regular procedure, that was not the "cause" of Petitioner's termination. The Court of Appeals held that, "Romero was terminated because of his repeated misconduct while employed by the School District. The defendants' retaliatory motives, if they did exist, were not a motivating factor in this decision." (A12) The Hearing Officer's findings of fact and recommendation to the Board that Petitioner be dismissed were the motivating factor in the dismissal. Since the parties stipulated that the Hearing Officer's findings and recommendation were the "sole" factor upon which the Board of Education relied, any improper motives by Dr. Aguayo had no causal connection to the dismissal.

The principles governing a public employee's First Amendment retaliation claim are well-established. Upon a showing that the speech in question is constitutionally protected, the employee must prove that the speech was a substantial or motivating factor in the challenged employment decision. *Mt. Healthy City School District Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568 (1977). *See also, Wulf v. City of Wichita*, 883 F.2d 842, 856 (10th Cir. 1989). The burden then shifts to the defendant to show by

a preponderance of the evidence that it would have reached the same decision absent the protected activity. Here, there is no dispute that the motivating factor in Petitioner's dismissal was **not** his claimed constitutionally protected activity but was, instead, the Hearing Officer's findings and recommendation.

The trial court concluded that the Hearing Officer's recommendation severed any causal link between the termination and any alleged improper motives of an individual Defendant. Petitioner based his entire appeal of the § 1983 claim on this finding. The causation inquiry in a § 1983 case looks to the reason for a challenged action and not the chain of events which led up to it. Petitioner does not even come close to showing that there is any direct conflict between the decision in this case and United States Supreme Court precedent and decisions of other circuits. There is nothing unique or new about the causation analysis of either the District Court or the Court of Appeals. The controlling Supreme Court case on mixed motive termination deals specifically with the causation inquiry and the "chain of events" theory.

> In other areas of constitutional law, this Court has found it necessary to formulate a test of causation which distinguishes between a result caused by a constitutional violation and one not so caused. We think those are instructive in formulating the test to be applied here.

Mt. Healthy School Dist. v. Doyle, 429 U.S. at 286, 97 S.Ct. at 575.

Chief Justice (then Justice) Rehnquist then went on to cite *Lyons v. Oklahoma*, 322 U.S. 596, 64 S.Ct. 1208, 88 L.Ed. 1481 (1944); *Nardone v. United States*, 308 U.S. 338, 341, 60

S.Ct. 266, 84 L.Ed. 307 (1939); *Wong Sun v. United States*, 371 U.S. 471, 491, 83 S.Ct. 407, 419, 9 L.Ed.2d 441 (1963); and *Parker v. North Carolina*, 397 U.S. 790, 796, 90 S.Ct. 1458, 25 L.Ed.2d 785 (1970). He noted that *Parker* and *Wong Sun* relied on the oft-quoted language from *Nardone*, "The connection between the arrest and the statement (given several days later) had 'become so attenuated as to dissipate the taint,' *Nardone v. United States*, 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307 (1939)." 371 U.S. at 491. This Court then concluded:

> While the type of causation on which the taint cases turn may differ somewhat from that which we apply here, those cases do suggest that the proper test to apply in the present context is one which likewise protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights.

429 U.S. at 287, 97 S.Ct. at 576.

Petitioner's contention that the individual defendants "caused" his termination mistakenly focuses upon the "chain of events" analysis. He argues that the wrongful motives of the individual Defendants resulted in an investigation which resulted in charges being filed, which, in turn, caused a hearing to be held, which led to findings by a neutral hearing officer, which led to a decision by the board of education to terminate based solely on those findings. By following this chain reaction of events, Petitioner ultimately concludes that he never would have been fired (even though he does not dispute that he deserved to be) but for the alleged wrongful motives of an individual Defendant. Petitioner is basing

his analysis on a classical negligence "chain of events" analysis.

That, however, is not the proper analysis. Rather, the Court must determine whether Petitioner met his initial burden that some protected activity was a *motivating factor* in the decision to terminate. *Mt. Healthy*, 429 U.S. at 287, 97 S.Ct. at 576. There is no dispute as to what motivated the decision by the Board of Education in this case. The parties stipulated that the "moving force," indeed, the **sole** force causing the termination, was the findings of the Hearing Officer that grounds for dismissal existed and his recommendation of termination. Discovery in this case produced no evidence of any other motivation by the Board of Education members. That should end the discussion. The Hearing Officer's findings of evidentiary fact are binding on the Board. *Blaine*, 748 P.2d at 1288.

It is noteworthy that throughout Petitioner's argument in this case, in the District Court, Court of Appeals, and now in this Court, he completely and totally ignores his own conduct against his own students which was the cause of his dismissal. The charges that were made by the students and parents to Dr. Aguayo in January, 1986, **required** an investigation by the appropriate school administrator and the subsequent findings at the adversarial hearing by a neutral hearing officer substantiated the requirement that those charges be investigated. The findings by Hearing Officer Snider involved "instances of physical abuse of students, violation of interscholastic wrestling rules, disruption to the school community, blackmail of students, promoting negative rather than positive social conduct and other causes of discipline."

(A118) He concluded, "It is difficult to consider this catalogue of misconduct and recommend any action other than dismissal." (A118)

Petitioner quotes a provision from *Malley v. Briggs*, 435 U.S. 335, 374, n. 7, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986), that § 1983 "should be read against the background of tort liability and it makes a man responsible for the natural consequences of his action." In the context of this case, the application of that standard is in no way helpful to Petitioner. Even if Dr. Aguayo was improperly motivated in the investigation "which did not follow the normal procedural sequence," it must then be determined what are the "natural consequences of his action." The findings of the Hearing Officer were not based on procedures in the investigation or on the investigation itself; they were based on the first-hand testimony under oath of students, parents, and fellow teachers, all of whom were subject to the most aggressive cross examination. Such a hearing dissipated any possible taint in the procedural sequence followed in the investigation. Even if Petitioner could have demonstrated improper motive, the trial court was absolutely correct that the findings of the hearing officer " . . . break the chain of causation between any retaliatory motivation by individual defendants and their investigative and prosecutive roles in the discharge decision." (A27)

In the face of these findings by the Hearing Officer, it would be impossible for a board of education to fulfill its responsibility and do anything other than terminate the teacher. Petitioner cannot overcome those findings and those findings are good and sufficient grounds for the Board's action.

The procedures of the Tenure Act effectively prevent any possibility of the type of unfairness or bias Petitioner argues happened in this case. As noted elsewhere, the Board itself serves as a check on any improper motives by administrators by initially deciding whether the case should even go forward. C.R.S. § 22-63-117(2). The administrative hearing procedure, subject to rules of civil procedure, affords the most significant check on administrative abuse. The board's ultimate decision is significantly limited by the findings of fact made by the administrative hearing officer. *Blaine, supra.* Finally, the state appellate courts have further powers of review. C.R.S. § 22-63-117(11). Given these multiple checks and levels of review, it is virtually impossible for a teacher to lose his or her job as a result of improper and abusive motives on the part of administrators.[5] Certainly, the Tenure Act procedures achieved their purpose of guaranteeing fairness in this case. The fact that Petitioner challenges neither the fairness of the process nor the facts found by the Hearing Officer in the tenure case is fatal to his claims asserted here.

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[5] Petitioner's claim that the Board of Education of the Denver Public Schools "routinely discharged teachers whose discharge was sought by the administration" had no support in the record. Indeed, the only "evidence" that Petitioner presents for that proposition is a newspaper article, published three years after the termination of Romero, when the President of the Board of Education was commenting on another teacher tenure case. Respondent needs more than a newspaper article to establish "district policy." He needed facts to support the contention, and the record is devoid of such facts. Indeed, even

(Continued on following page)

The District Court and Tenth Circuit determined that Petitioner did not meet the threshold standard of *Mt. Healthy*; he did not produce evidence to show that the

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(Continued from previous page)

after extensive additional discovery which was allowed following oral argument on summary judgment, the district court concluded: " . . . the deposition testimony of four Board members was that each of them made a decision based solely on the record before the Hearing Officer." (A34) That finding, which Petitioner did not challenge in the Court of Appeals, dispelled the argument that the Board was merely "a rubber stamp."

This alleged policy of automatic termination, once an administrator recommended termination, would clearly violate the Colorado Supreme Court's interpretation of the Tenure Act that a board can only terminate a teacher if the findings of fact of the hearing officer support the statutory grounds for termination. *Blaine v. Moffat County School District RE No. 1*, 748 P.2d at 1288. If such an illegal policy existed, then how does Petitioner explain his failure to appeal this termination through the regular channels of the Tenure Act to the Colorado appellate courts?

City of St. Louis v. Praprotnik, 485 U.S. 112, 108 S.Ct. 915 at 924, 99 L.Ed.2d 107 (1988), held that to establish § 1983 liability against a municipality "the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in *that area* of the City's business." (cites omitted) 108 S.Ct. at 924. *Pembaur v. Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed2d 452 (1986), held that whether an official had final policy making authority is a question of state law. 475 U.S. at 483, 106 S.Ct. at 1300. In Colorado, a president of a board of education has no such authority; only a board of education can exercise final policy making authority. C.R.S. § 22-32-109, *et seq.* In this case, plaintiff failed to demonstrate any policy in violation of state law existed.

Board of Education was motivated by any constitutionally protected activity of Petitioner. The well-settled causation test enunciated in *Mt. Healthy* was correctly applied by the District Court and Court of Appeals, and there is simply no basis for granting a writ of certiorari in this case.

B. The courts below correctly determined that Petitioner presented no material facts to show that retaliation for the alleged exercise of free speech was a motivating factor in his termination.

In an effort to overcome the clear lack of evidence of any improper motivating factor attributable to the Board of Education, Petitioner makes some significant unsupported statements. His statement on page 13 that, "Romero proved in state court that he was removed as head wrestling coach and transferred twice because of his participation in a peaceful, nondisruptive protest by his wrestling team over racial indignities suffered the previous school year at another school," has no support in the record, was not an argument presented in the Court of Appeals and, is simply untrue. The only hearing that ever occurred in state court on that issue in a prior case was his request for a preliminary injunction. In dealing with those allegations, Judge Matsch specifically noted that Romero "sought a preliminary injunction which was refused." (A17) Judge Matsch had previously ruled that none of the defendants could be liable for retaliation for the claimed exercise of constitutional rights in connection with the temporary removal as a wrestling coach on the

transfers because Petitioner was barred as to those incidents based on a settlement agreement. (Amended Stipulated Pretrial Order, A137) Petitioner did not challenge that ruling on the appeal in the Tenth Circuit. Petitioner alleged a great deal, but proved nothing.

More importantly, in the discovery in connection with this case, the Petitioner admitted that he had no knowledge of any connection that any of the defendants, including Dr. Aguayo, had in his transfers and that he simply "imagined" that Dr. Aguayo had some knowledge of his prior suspension as wrestling coach. In the same vein, Petitioner claims that his attendance at the Scheele trial was "openly challenged by Aguayo." (p. 15) The record is devoid of any such challenge; the District Court correctly noted "Aguayo saw Romero there (at the trial)." (A18)[6]

It should be noted that the only possible improper motivation that was found by the Hearing Officer or the district court in connection with Dr. Aguayo related simply and solely to the procedural sequence in the *investigation*. It is incorrect for Petitioner to state that the administrator who instigated the proceedings against him was Dr. Aguayo. Under the Colorado statutes, only the Superintendent could file charges with the Board of Education, C.R.S. § 22-63-117(2), and that is exactly what happened in this case. Under those same statutes, only a Board of Education could accept those charges for review,

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[6] The District Court noted that, "Since Romero was not a witness in the *Scheele* trial, coverage of that claim by section 1985(2) is questionable." (A34)

C.R.S. § 22-63-117(2),(3) triggering the hearing before a neutral third party hearing officer.

Petitioner's claim of improper motivation stops at the investigation stage, simply because the sworn testimony of his own students, their parents, and his fellow teachers at the hearing held under the Tenure Act was so condemning and conclusive. He simply ignores and fails to note on pages 14 and 15 of his Petition that both the Hearing Officer, the District Court, and Court of Appeals concluded that regardless of any alleged improper motivation by the administrator in the conduct of the investigation, it was Romero's own improper and illegal actions against his own students that were the basis for his termination, and not any possible improper motivation in deviating from the normal procedural sequence in the investigation. (A119, 35, 12)

C. There is no conflict with other Tenth Circuit cases.

Two Tenth Circuit cases on which Petitioner relies for the proposition that summary judgment was improper are clearly distinguishable from the case at Bar. In neither case was there an intervening adversary hearing before a neutral hearing officer with findings of extensive wrongdoing. In *Ware v. Unified School District No. 492*, 902 F.2d 815 (10th Cir. 1990), the board of education terminated the school superintendent's secretary, who also acted as clerk of the board. The district provided no hearing prior to her dismissal. The majority noted that since there was no *respondeat superior* liability, it would require a direct causal link between Ware's exercise of First Amendment rights and her dismissal so that Board liability would lie

only for "deliberate indifference" to plaintiff's rights. The board members testified that they believed that Ware's speaking on a bond issue was a cause in her termination so the majority held the First Amendment issue should have been sent to the jury for resolution. These facts are far different from those in this case. Here, the Petitioner was given a full-scale adversary hearing before a neutral hearing officer. There was voluminous evidence of misconduct and the hearing officer made specific findings of fact of such misconduct. Under Colorado law, those findings of misconduct by the hearing officer are binding on the board of education, and the petitioner stipulated that the board was motivated solely by those findings of misconduct.[7] There was **no evidence** the board acted upon alleged exercise of First Amendment rights of the Petitioner.

Saye v. St. Vrain Valley School District RE-1J, 785 F.2d 862 (10th Cir. 1986) involved a nonrenewal of contract and not a dismissal action. Saye was a probationary teacher who could be non-renewed without a hearing. C.R.S. § 22-63-110. Saye alleged that he was terminated for union organizing which was protected by the First Amendment, and school board members testified that in

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[7] Petitioner incorrectly notes that Hearing Officer Snider urged the School District to place Romero on a one-year probation. (Petition, p. 23, footnote 2) The Hearing Officer simply noted that probation was an option that the Board may wish to consider since he did not have such an option under the law. (A120) However, his categorical determination was, "It is difficult to consider this catalogue of misconduct and recommend any action other than dismissal." (A118)

voting not to renew Saye's contract, they relied completely on the recommendation of the superintendent who was familiar with Saye's union activity. There was no intervening hearing by a neutral hearing officer in the *Saye* case; there were no findings of fact by a hearing officer that were binding on the board of education.

The decision of the Court of Appeals does not conflict with any Tenth Circuit decisions.

D. The Tenth Circuit decision does not conflict with Supreme Court precedent or decisions of other circuits.

Petitioner simply ignores the "taint" case analysis of *Mt. Healthy*, 429 U.S. at 287, and cites a number of other cases in an attempt to bolster his notion of tort-style cause. However, an examination of those cases, which were also cited to the Tenth Circuit, reveals that they are simply not applicable or plainly distinguishable.

Petitioner emphasizes the Supreme Court decision in *Malley v. Briggs*, 435 U.S. 325, 106 S.Ct. 1092, 89 L.Ed. 271 (1986). *Malley* involved a case of police immunity under § 1983. Plaintiffs alleged unconstitutional arrest by defendant's presenting a judge with an affidavit and complaint which did not establish probable cause. The causal chain argument was not even raised, but was discussed at footnote 7, 106 S.Ct. at 1098 of the Court's opinion. It said it did not find any break in the causal chain because the common law recognized a causal link between submission of a complaint and an ensuing arrest. The court did not decide whether the police department's actions were

objectively reasonable, but sent the issue back for reconsideration. It should be emphasized that the grand jury did not return an indictment, therefore, the charge was dropped.[8]

The situation in *Malley* cannot be analogized to this case. Petitioner's complaint is that he was wrongfully terminated. Unlike the situation in *Malley*, the Petitioner here was not exonerated; the charges against Petitioner proved true. Petitioner was not terminated because of the procedures followed in the investigation. The neutral hearing officer found that Petitioner was guilty of misconduct, justifying his dismissal, and the Petitioner does not even challenge that finding and conceded the hearing was fairly conducted. Petitioner's reliance on *Malley* is misplaced.

Petitioner's citation of *Arlington Heights v. Metro Housing Corp.*, 429 U.S. 252, 97 S.Ct. 55, 50 L.Ed.2d 450 (1977) is curious and confusing. That case involved alleged violations of the Fair Housing Act and the Fourteenth Amendment. The issue was race discrimination, and the statement cited in Petitioner's petition referred to proof of discriminatory intent. Plaintiffs in that case failed to show a series of official actions taken for invidious purposes. While it is questionable whether this

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[8] The Supreme Court has held that an indictment by a properly constituted grand jury exclusively determines the existence of probable cause. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 945 S.Ct. 1895, 40 L.Ed.2d 406 (1974). Probable cause exists even if the indictment is based on unreliable, incompetent or even perjured testimony. *U.S. v. Calandra*, 414 U.S. 338, 344-45, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974).

line of reasoning applies to this case, the record does not show a series of official actions taken for invidious purposes against Romero. To the contrary, the record shows the District acted properly in dismissing him, and that the appeal of his dismissal would have been affirmed by the Colorado Court of Appeals.

Professional Association of College Educators v. El Paso City Community College, 730 F.2d 258 (5th Cir. 1984), *cert denied*, 469 U.S. 881, 105 S.Ct. 248, 83 L.Ed.2d 186 (1984) was another case involving termination without a hearing, in this case for union organizing. It is interesting to note that footnote 13, discussing potential reinstatement, said plaintiffs would not be entitled to reinstatement if subsequent facts found misconduct not justifying reinstatement. In this case, the acts of misconduct were detailed during an adversary hearing, and justified Petitioner's termination. The case is clearly not applicable.

Flores v. Pierce, 617 F.2d 1386 (9th Cir. 1980) was a liquor licensing case. The plaintiff's original application was initially denied, then cleared through the division of Alcoholic Beverage Control. The evidence showed that the commission would initially deny any application if there was a colorable complaint from public officials. The Ninth Circuit disagreed with the city officials' attempt to shift the blame to the Division, stating that the violation was not the initial denial, but city officials' policy of forcing applicants to take extraordinary measures for issuance of a license. Petitioner's argument appears to be that when a school administrator decides an employee should be terminated that termination is inevitable. While for purposes of this case it may be argued that filing of charges was inevitable, it was not inevitable that

the ALJ would make extensive findings of gross misconduct and/or recommend termination. Judge Snider's statement about the inevitability of dismissal related to filing of charges, not the ultimate result. The dismissal was based solely on the finding of Judge Snider.

Goodwin v. Metts, 885 F.2d 157 (4th Cir. 1989) and *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988), cited in *Goodwin*, involved deliberate supplying of misleading information by police officers leading to arrest. Neither of these cases discussed the Supreme Court cases on probable cause, *supra*. However, Petitioner has not presented evidence that had it not been for alleged improper actions by Aguayo, he would not have been charged or dismissed. By his own admission, there were complaints lodged against him by parents and students, which initiated the investigation. Even Petitioner does not claim, and he presented no evidence to show anyone, including Dr. Aguayo, provided misleading information.

Rodriguez v. Comas, 888 F.2d 899 (1st Cir. 1989), is also a case where the § 1983 plaintiff had been subjected to the hazards of defending himself in a criminal procedure, but was acquitted, as a result of the wrongfully motivated actions of the defendant. For the reasons already noted, that fact distinguishes the subject case.

The trial court correctly concluded that there was no causal link between any improper motive by an individual Defendant and the Board's dismissal of Petitioner. The procedural sequence of the initial investigation is the only possible "taint" found here. (A35) There is no contention that the individual Defendants improperly influenced or tainted the statutory Tenure Act proceedings.

Those proceedings provided Petitioner with a full and fair opportunity to defend himself. The "moving force" behind Petitioner's dismissal was the findings and recommendation of the Hearing Officer in the Tenure Act case, not the allegedly improper motive of an individual Defendant. (A35, A12)

CONCLUSION

Review is not warranted by any of the considerations in Rule 10 of the Supreme Court rules. Moreover, the outcome of this case depended in a large part on the requirements of state statutory law and the overwhelming factual evidence that justified Petitioner's dismissal. Court review of this case will generate a decision of little precedential value for cases in Colorado, or in states with statutory mechanisms for deciding public employee dismissals. Finally, the lack of cases factually similar to this demonstrates the unusual nature of this Petition, and does not justify use of this Court's scarce resources.

This case does not involve any novel issue; the causation test for a mixed motive case was definitively resolved in *Mt. Healthy*, and it was correctly applied in this case. The decisions are not in conflict with any

Supreme Court precedent or applicable decisions of other circuits. The Petition for Certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondents

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 87-M-6

EDWARD J. ROMERO,

Plaintiff,

vs.

ALBERT AGUAYO, et al,

Defendants.

AMENDED STIPULATED PRE-TRIAL ORDER

I. DATE AND APPEARANCE

The Plaintiff is represented Larry F. Hobbs. The Defendants are represented by Semple & Jackson, P.C. by Martin Semple and Dwight L. Pringle.

II. JURISDICTION

The court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343. Plaintiff is alleging claims arising under the First and Fourteenth Amendments to the United States Constitution, pursuant to 42 U.S.C. §§ 1983 and 1985.

III. CLAIMS AND DEFENSES

A. Plaintiff's Claims

Plaintiff was at all times material times a regularly certified public school teacher employed by the defendant school district under tenure until he was dismissed on June 19, 1986. In addition to the defendant school district the individual defendants are, at times material, Scamman, Superintendent, Aguayo, Assistant Superintendent, and Moser, Principal at Manual High School. At the time of his discharge plaintiff was assigned as a classroom teacher of industrial arts of Manual High School. He was also Manual High School's head wrestling coach. Prior to his assignment at Manual High School he had been assigned at Henry Junior High School.

Plaintiff states two (2) claims, the first against all defendants pursuant to 42 U.S.C. § 1983. Here, plaintiff claims that all defendants caused his discharge for constitutionally protected conduct including plaintiff's persistent advocacy of the rights of minority students in the defendant school district, and because of his participation and support of a colleague coach, Glenn Scheele, in Scheele's litigation against the defendant Aguayo and the defendant school district in this court in Civil Action No. 83-K-321.

In his claim pursuant to 42 U.S.C. § 1983, plaintiff seeks compensatory damages against all defendants and exemplary damages against the defendants Scamman, Aguayo, and Moser, claiming that these defendants, or each of them, acted with malice or willful disregard for his rights.

In his claim pursuant to 42 U.S.C. § 1985(2), plaintiff claims that the individual defendants, Scamman, Aguayo, and Moser, conspired in seeking and procuring plaintiff's discharge to injure the plaintiff in his person and property on account of his attendance in this court on behalf of Scheele in Civil Action No. 83-K-321.

In his claim pursuant to 42 U.S.C. § 1985(2), plaintiff seeks compensatory and exemplary damages against the individual defendants claiming the individual defendants acted with malice or in willful disregard of plaintiff's rights.

Plaintiff also seeks reinstatement to his teaching position and award of attorney's fees pursuant to 42 U.S.C. § 1988.

B. Defendants' Claims and Defenses

Defendants deny all allegations of liability.

While defendants admit that plaintiff's employment as a tenure teacher with the defendant district was terminated on the date alleged, defendants deny that the reasons for the termination were plaintiff's allegedly constitutionally-protected activities. Rather, defendants contend that the reasons for plaintiff's dismissal were those set forth in the Board's Order of Dismissal which are based on the findings of fact and recommendations of Administrative Law Judge Marshall Snider in the proceedings brought against plaintiff on February 20, 1986 pursuant to the Colorado Teacher Employment, Tenure and Dismissal Act, C.R.S. 22-63-101, *et seq.* (Tenure Act) Those findings concluded that the District had proven

several of the statutory grounds for dismissal under the Tenure Act and recommended to the Defendant Board of Education that plaintiff be dismissed.

Defendants also deny the existence of any conspiracy since all defendants are part of the same entity and therefore, could not, as a matter of law, conspire among themselves.

Defendants contend that plaintiff is prohibited from recovering damages for any events predating the settlement in Civil Action No. 82 CV 5767 captioned *Romero vs. School District No. 1.* Although the court has indicated that plaintiff may present evidence of events predating the settlement agreement as historical background, defendants maintain plaintiff is precluded from recovering damages with respect thereto and defendants are entitled to an instruction to that effect.

By way of defenses, defendants contend that plaintiff failed to timely exhaust his remedies under the Tenure Act, which provided judicial review in the state courts. Defendants have successfully contended that the facts litigated and determined in the Tenure Act case shall not be subject to relitigation in this case. Defendants further contend that plaintiff has failed to mitigate his damages, if any.

Individual defendants contend that they are protected from liability in this case by the doctrines of qualified and/or absolute immunity, insofar as their actions as alleged in the complaint were undertaken in good faith and within the scope of their official duties.

IV. STIPULATIONS

A. Plaintiff was at all times material a regularly certified teacher employed by the defendant school district until June 19, 1986.

B. The individual defendants, Scamman, Aguayo, and Moser, were employed as administrators with the defendant school district, and at all relevant times were acting as employees of the School District under color of state law.

C. School District No. 1, City and County of Denver, as a defendant, is a person as that term is used in 42 U.S.C. § 1983, and its actions herein have been actions under color of state law.

D. On June 19, 1986, plaintiff was discharged for cause by the Board of Education of the Defendant School District.

E. Plaintiff could only be discharged for statutorily specified cause.

F. Plaintiff was subpoenaed by Scheele as a witness, but plaintiff did not testify at trial in *Scheele v. Aguayo* nor was he deposed in that case.

G. Plaintiff was afforded a hearing as provided by the Teacher Tenure Act, at which he was represented by counsel. Pursuant to C.R.S. § 22-63-117, Hearing Officer Snider made findings that certain of the statutory charges for dismissal had been proved and recommended plaintiff's termination.

H. Relying solely on Mr. Snider's finding and recommendation, the Board of Education voted to dismiss plaintiff.

I. Plaintiff did not seek review of the Board's action of dismissal in the Colorado Court of Appeals as provided by C.R.S. § 22-63-117.

* * *

DATED this 20th day of July, 1988.

BY THE COURT:

s/Richard P. Matsch
Richard Matsch
United States
District Judge

APPROVED AS TO FORM:

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Case Number: 87-M-6

I certify that I mailed a copy of the attached to the following:

Dated: July 20, 1988 JAMES R. MANSPEAKER, CLERK

BY: Glenna Bloxson
Jacob Gilmore,
Deputy Clerk
Glenna Bloxson,
Secretary

Martin Semple
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Larry F. Hobbs
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No. 91-601

IN THE

SUPREME COURT OF THE UNITED STATES

October 1991 Term

EDWARD J. ROMERO,

Petitioner,

v.

ALBERT AGUAYO, DONALD MOSER, JAMES SCAMMAN, and SCHOOL DISTRICT NO. 1, CITY AND COUNTY OF DENVER,

Respondents.

Petition for Writ of Certiorari To The United States Court of Appeals For The Tenth Circuit

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. THE DISTRICT COURT CORRECTLY DECIDED ROMERO'S FEDERAL CLAIMS WERE NOT PRECLUDED BY THE STATE ADMINISTRATIVE PROCEEDINGS.

Respondent's mistakenly assert Romero's federal claims should have been dismissed because of the preclusive affect given to issues or claims already determined in a state administrative proceeding. Brief in Opposition, p. 7 n.3.

Judge Jim Carrigan of the district court, relying on *Marino v. Willoughby*, 618 P.2d 728 (Colo. App. 1980), correctly decided Romero's federal claims were not barred by the doctrine of *res judicata*. In *Marino*, the plaintiff appealed his discharge from the city police force. He was represented by counsel at an evidentiary hearing before the City's Civil Service Commission which upheld the discharge. Rather than seek review of

the Commission's decision, the plaintiff filed at § 1983 action. The trial court granted the defendant's motion to dismiss based on *res judicata* arguing plaintiff could have raised the constitutional issues in the hearing before the Commission, failed to do so, and was thereby barred from raising them in action for damages. The Colorado Court of Appeals overruled the trial court, holding the City Charter did not authorize the Commission to grant monetary relief for violations of federal rights established by § 1983.

> The Commission had no jurisdiction at that time to resolve completely the federal statutory and constitutional claims Marino raises here . . .
>
> . . . Even if Marino had presented to the Commission the ground underlying the federal claims here asserted as defenses to dismissal, a decision by the Commission to

> reinstate Marino could not have resolved completely his claims for damages against Willoughby and [the City of] Pueblo based on alleged violations of federal rights.

Marino, 618 P.2d at 730 and 731 (Emphasis supplied).

The facts are identical in this case. The hearing officer was not empowered to "resolve completely" Romero's constitutional claims. Rather, he was only authorized to make findings of fact and issue a recommendation to retain or discharge. C.R.S. § 22-63-117(a).

The administrative proceeding in this case concerned only whether cause existed to terminate Romero. Romero did not press his constitutional claim in the tenure dismissal hearing. It matters not that Romero could have raised the claim in the hearing because the hearing

officer was not authorized to decide and remedy the constitutional claim. For that reason alone, the hearing can not be equated with a judicial trial.

Judge Carrigan decided the Colorado tenure act did not provide for complete resolution of Romero's constitutional claims. The doctrine of *res judicata* is inapplicable to this case. Thus, the hearing officer's factual findings have no preclusive affect upon the district court, the Tenth Circuit, or this court.[1]

II. THE CAUSATION ANALYSIS URGED BY ROMERO IS APPROPRIATE.

Respondents assert the causation inquiry in a § 1983 case looks to the

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[1]Judge Matsch, in granting summary judgment, did not challenge Judge Carrigan's decision regarding the applicability of *res judicata* to this case.

reason for a challenged action and not the chain of events leading up to it. Brief in Opposition, p. 13. The respondents' analysis of the causation requirement under § 1983 is overstated.

There must be a showing of causation between the unconstitutional act and the subsequent harm. Causation in the traditional negligence "but for" sense is an element of a claim under § 1983. App. A130. It is accepted that § 1983 is to be read against the background of tort liability that makes a man responsible for the natural consequences of his action. *Monroe v. Pape*, 365 U.S. 167, 187, 81 S.Ct. 473, 484, 5 L.Ed.2d 492, 505 (1961), *overruled in part on other grounds, Monell, et al. v. Dept. of Soc. Svcs. of the City of New York, et al.*, 436 U.S. 658, 98 S.Ct. 2108, 56 L.Ed.2d

611 (1978); *Stringer v. Dilger,* 313 F.2d 536, 540 (10th Cir. 1963); *Jones v. City of Chicago,* 856 F.2d 985, 993 (7th Cir. 1988); *Goodwin v. Metts,* 885 F.2d 157, 162 (4th Cir. 1989), *cert. den.*, ___ U.S. ___, 110 S.Ct. 1812, ___ L.Ed.2d ___ (1990). More is involved in proving a claim against a governmental institution but the "but for" causal analysis is not excluded. Cases relied upon by the respondents before the Tenth Circuit confirm this. *Harris v. City of Pagedale,* 821 F.2d 499, 507 (8th Cir. 1987), *cert. den.*, 484 U.S. 986, 108 S.Ct. 504, 98 L.Ed.2d 502 (1987), *reh. den.*, 484 U.S. 1083, 108 S.Ct. 1066, 98 L.Ed.2d 1027 (1988), states:

> Municipal liability under § 1983 cannot be premised on the <u>mere</u> fact that the unconstitutional act resulted from a municipal custom in a "but for" sense; it must be

> shown that the act was taken "pursuant to" the custom, i.e., that the municipal custom was "the moving force of the constitutional violation. *Pembaur*, 106 S.Ct. at 1299-1300 n.11 (plurality opinion) (citation omitted); *Monell*, 436 U.S. at 694, 98 S.Ct. at 2037. (Emphasis supplied).

Pembaur v. City of Cincinnati, et al., 475 U.S. 469, 482 n.11, 106 S.Ct. 1292, 1299-1300 n.11, 89 L.Ed.2d 452, 464 n.11 (1986), states:

> Although there was no opinion for the Court on this question, both the plurality and the opinion concurring in the judgment found Plaintiff's submission inadequate because she failed to establish that the unconstitutional act was taken *pursuant* to a municipal policy rather than <u>simply</u> resulting from such a policy in a "but for" sense. (Emphasis in the original and supplied).

Ware v. Unified School Dist. No. 492, Butler County, State of Kansas, 902 F.2d 815, 819 (10th Cir. 1990), recognizes that:

> . . . a direct causal link must exist between the acts of the governing body sought to be held liable and the alleged constitutional deprivation
> . . .
>
> a municipality can be liable under § 1983 only where its policies are the "moving force [behind] the constitutional violation."

Nothing in *Ware* indicates the causation inquiry looks to the reason for the challenged action at the exclusion of the chain of events leading up to it.

There are two parts to the causation inquiry in establishing a § 1983 claim against a governmental institution. There must be proof of "but for" causation of the alleged deprivation. 42 U.S.C. § 1983; *Monroe v. Pape, supra; Malley v. Briggs,* 435 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986); *Stringer v. Dilger, supra; Jones v. City of Chicago, supra; Goodwin v. Metts, supra.* In

addition, there must be proof that the act causing the deprivation was done pursuant to or reflects official policy. *Pembaur v. City of Cincinnati, et al., supra; Harris v. City of Pagedale, supra; Ware v. Unified School Dist. No. 42, Butler County, State of Kansas, supra.* Thus, Romero's reliance on the factual history and chain of events leading to his termination is appropriate. See also *Arlington Heights v. Metro Housing Corp.*, 429 U.S. 252, 266, 97 S.Ct. 555, 564, 50 L.Ed.2d 450, 465 (1977) (One factor to be considered is the "historical background of the decision").

III. THE STIPULATION THAT THE BOARD RELIED SOLELY UPON THE HEARING OFFICER'S FINDING AND RECOMMENDATION DOES NOT BREAK THE CHAIN OF CAUSATION BETWEEN ITS ACTION AND THE IMPROPER MOTIVE OF AGUAYO.

Romero has conceded all along and it is undisputed that absent Aguayo's unlawfully motivated conduct, Romero could have been discharged. The relevant inquiry, however, and what Romero has always contested, is whether absent Aguayo's unlawfully motivated conduct, Romero would have been discharged.

Romero does not rely only upon a quote in a newspaper article to show the respondent district had a policy of always terminating teachers brought up on charges under the Teacher Tenure Dismissal Act. Part of the record before the Tenth Circuit was deposition testimony of the same board of education president who gave the newspaper interview. In his testimony, the president admitted making the statement in the paper, that he was quoted

correctly, and confirmed that he knew of no teacher who had gone through the tenure dismissal proceeding who had been retained.

Q Can you identify Exhibit 1?

A Yes. It was an article that appeared in one of the local papers.

Q It was an article that appeared on June the 14th, 1989 on the Rocky Mountain News; is that not correct?

A If that's what the date says. I'm not sure about the exact date of --

Q Anyway, you recall the article? You've read it?

A Yes.

Q And you are quoted in that article, am I not correct?

A Yes.

Q Were you quoted correctly?

A As far as I recall, yes. . .

> Q Well, my question is: Do you recall any tenure dismissal proceeding in which you have been involved as a board member in which the teacher has not been dismissed?
>
> A No.
>
> Q And that includes, does it not, those cases in which the administrative law judge may have recommended retention?
>
> A Yes.

The board's policy was also confirmed by another board member, Paul Sandoval, in his deposition, which was part of the record before the Tenth Circuit:

> Q Well, do you ever remember a tenure dismissal proceeding during your time on the school board where charges were brought, there was a hearing, there was a recommendation, either of retention or dismissal, and the case resulted in anything other than a dismissal of the teacher?
>
> A Not to my knowledge, no.

Subsequent to the discovery revealing the respondent district's policy of always

terminating teachers subjected to tenure proceedings, Romero sought release from the stipulation in the district court. The district court never decided whether Romero would be relieved from the stipulation. Instead, the district court entered summary judgment for the respondents.

The stipulation says nothing about the motivation of the respondent district's board of education. The stipulation states:

> Relying solely on Mr. Snider's finding and recommendation, the board of education voted to dismiss plaintiff.

(Emphasis supplied). A distinction exists between reliance and motivation. Webster's Ninth New Collegiate Dictionary (1984) defines "rely" as "to have confidence based on experience" or "to be dependent". Certainly, under Colorado

law, to terminate a teacher, the board of education must first have a recommendation from an administrative law judge subsequent to a due process hearing. C.R.S. § 22-63-117(10). However, reliance or dependence upon the recommendation of an administrative law judge says nothing about the motivation of the board of education. Webster's defines "motivation" as "the condition of being motivated" or "a motivating force, stimulus or influence". In turn, "motive" is defined as "something that causes a person to act".

Romero has previously demonstrated Aguayo's unlawfully motivated conduct, setting in motion the process which inevitably led to his discharge. The facts also show the policy of the board of education to go beyond the official

record before the hearing officer, as well as its knowledge of the history of the district's relationship with Romero. Under *Mt. Healthy School Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1987), wherever improper motive in retaliation for constitutionally protected conduct plays any part, it is not enough for the defendant to show that the same result can be justified. Rather, the defendant must show that the same result would obtain in any event.

Therefore, in any mixed motive case, it will always be the case that the result can be justified, which is all plaintiff conceded when he admitted below that 1) the administrative procedure was fair, and 2) that the result would have been sustained upon appellate review as supported by substantial evidence.

This does not, however, concede that in any event the same result would obtain. If there had been no improper motivation to investigate and charge, would there have been a charge in any event? Plaintiff at least presented evidence to raise a question of fact in this particular not capable of resolution on a motion for summary judgment. He showed that charges of no consequence when first made to his principal, Moser, became a predicate for his discharge when Aguayo took over the investigation. Even the Hearing Officer suggested probation should be considered, which is hardly consistent with what respondents characterize as his "most damning conclusions."

Moreover, the improper motivation of Aguayo is clearly shown to pervade the

entire process, not just the investigation. Aguayo was a witness in the hearing. According to Sandoval's deposition testimony, Aguayo may well have lobbied the final discharge vote.

The stipulation that the Board relied solely upon the hearing officer's finding and recommendation is not a stipulation to other than what appears of record in the board's order. What motivates a decision and the statement of reasons given for the decision are not one and the same.

In light of the facts and law previously argued to this court, the stipulation does not break the chain of causation between the actions of the board of education in voting to dismiss Romero and the improper motive of Aguayo. The reliance of the board of education

upon the hearing officer's finding and recommendation says nothing about its motivation.

IV. CONCLUSION

For all of the reasons expressed in Romero's petition for writ of certiorari and in this reply brief to respondents' brief in opposition to the petition for writ of certiorari, Romero's petition for writ of certiorari should be granted.

Respectfully submitted,

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